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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

GRACE A. INGHAM, AS EXECUTRIX, OF THE ESTATE OF PAUL B. INGHAM, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which became final on March 30, 1967.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, p. 1a).[1] is reported *sub nom. Ingham* v. *Eastern Air Lines, Inc.*, at 373 F. 2d 227. The opinion of the United States District Court for the Eastern District of New York (App., *infra*, p. 29a) is not reported.

[1] "App." refers to the appendix to the instant petition for certiorari. "J.A." refers to the joint appendix in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1967. The government's timely petition for rehearing was denied on March 30, 1967. By order dated June 29, 1967, Mr. Justice Harlan extended the time to file a petition for a writ of certiorari to and including August 26, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

On November 30, 1962, Eastern Air Lines' flight 512 crashed while landing at Idlewild Airport. In this suit against the United States under the Federal Tort Claims Act for damages sustained as a result of that accident, the following questions are presented:

1. Whether the misrepresentation exception of the Federal Tort Claims Act, 28 U.S.C. 2680(h), precludes the imposition of liability on the United States for the failure of a Federal Aviation Agency (FAA) air traffic controller to report certain weather information to Eastern flight 512.

2. Whether, under the applicable FAA regulations, FAA air traffic controllers were required to inform the crew of Eastern flight 512 of a quarter-mile change in airport visibility even though the visibility remained above the minimum for making a landing approach.

3. Whether, in any event, the failure to report the visibility change in question could be deemed a proximate cause of the accident.

STATUTES AND REGULATIONS INVOLVED

The Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, provides in pertinent part:

§ 1346(b). Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

§ 2680. *Exceptions.*

The provisions of this chapter and section 1346(b) of this title shall not apply to—

* * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

The Federal Aviation Agency Air Traffic Control Procedures Manual provides in pertinent part:

§ 265.2 At locations where official weather reports are obtained by the controllers through routine procedures and the ceiling and/or visi-

bility is reported as being at or below the highest "circling minima" established for the airport concerned, a report of current weather conditions, and subsequent changes, as necessary, shall be transmitted as follows:

A. By centers, as part of the approach clearance, to all aircraft to which the approach clearance is delivered directly to the pilot by the center controller;

B. By approach control facilities, to all aircraft at the time of the first radio contact or as soon as possible thereafter * * *.

STATEMENT

At 9:45 P.M. on November 30, 1962, Eastern Air Lines' regularly scheduled flight 512 missed the runway while attempting a landing at Idlewild (now John F. Kennedy) International Airport in New York. Twenty-five of the passengers and crew members aboard were killed in the resulting crash and more than a score were injured. The instant proceeding is a "test case" with respect to liability for damages resulting from the crash, brought by the representative of one of the passengers against Eastern Air Lines and against the government under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* The district court found both defendants liable and the court of appeals affirmed.

As to the government's liability, both the district court and the Second Circuit rested their decisions entirely on the fact that a Federal Aviation Agency air traffic controller did not inform the crew of Eastern flight 512 of a decrease in airport tower visibility from one mile to three-quarters of a mile. In so

grounding its decision, the Second Circuit's holding is in conflict with decisions of other circuits which have held that the misrepresentation exception to the Federal Tort Claims Act, 28 U.S.C. 2680(h), precludes the imposition of tort liability upon the United States for the dissemination of inaccurate weather reports. In addition, the court's decision rests on its reading of an FAA regulation as imposing a mandatory duty on air traffic controllers to transmit this type of weather information, a construction contrary to that of the agency which promulgated the regulation. This case thus turns both upon important considerations relating to the scope of governmental tort liability generally—the reach of the misrepresentation exception—and the allocation of duties between the FAA and the commercial airlines in a significant matter of air safety—the reporting of weather data. Unless otherwise noted, the facts as summarized are as found by the courts below.

The flight. Eastern Air Lines' flight 512 on November 30, 1962, was a DC–7B aircraft on a regularly scheduled flight from Charlotte, North Carolina, bound for Idlewild International Airport, in New York, with forty-five passengers and six crew members aboard (J.A. 1291a). En route the plane's crew was in constant radio contact with Eastern Air Lines' own stations, and was receiving information about conditions at Idlewild from Eastern's weather stations (J.A. 1299a). Not later than 8:22 that evening, Eastern flight 512 was alerted to fog conditions at Idlewild Airport (J.A. 1299a–1300a).

Under both FAA regulations and Eastern Air Lines' instructions, unless certain minimum weather conditions exist at an airport a commercial airliner may not attempt to land. In the case of the four-engined, propeller-driven DC–7B, those landing minimums were a ceiling of 200 feet with a visibility of one-half mile (App. 6a; J.A. 1294a). Several Eastern Air Lines' officials testified unequivocally[2] that, where those minimum weather conditions were met, it was the company's policy to attempt a landing and that its pilots were expected to make an approach to the runway and either land or execute a "missed approach".[3]

At 8:45 P.M. Eastern flight 512 entered the New York area where the Federal Aviation Agency Air Route Traffic Control Center (ARTCC) informed it of "a pretty bad fog on the airport" and of "delay" in landing (J.A. 1300a). Flight 512 thereupon entered the Idlewild "holding" pattern over Sandy Hook, New Jersey (App. 1313a). During the next three-quarters of an hour, flight 512 was regularly advised by ARTCC that aircraft were attempting to land at Idlewild, but that a number had been required to execute "missed approaches" (*ibid.*), and that the delay would be indef-

[2] See J.A. 174–175a, 194a–196a, 201a–203a, 1282a.

[3] As the court of appeals noted, a "missed approach" maneuver is basic to safe flying and one with which all commercial pilots must be familiar. To execute this maneuver, the pilot applies power to engines as he pulls the nose of the aircraft upward. Only when a positive rate of climb is obtained are the flaps and landing gear, previously lowered for landing, retracted. If the flaps and gear are retracted before a positive rate of climb has been established, instead of climbing the aircraft will descend at even greater speed (App. 7a).

inite due to the unfavorable weather conditions (*ibid.*). Finally, at 9:23 P.M., flight 512 was directed to contact "Idlewild approach" in preparation for an instrument landing system (ILS) approach (*ibid.*).

The instrument landing system (ILS). "ILS" is a system of electronic devices which assist the landing of aircraft under conditions of reduced visibility. Notwithstanding its name, under the ILS system the pilot lands the aircraft visually, not by instruments. ILS serves rather as an aid in aligning the approaching aircraft with the runway axis and in guiding it down to a level at which the pilot can see the runway. If the pilot cannot see the runway at the completion of an ILS approach, he must execute a standard "missed approach" maneuver. The point at which a missed approach must be executed varies with the capabilities of the aircraft. For a DC-7B of the type involved in this case, that critical point was at an altitude of 200 feet and one-half mile of visibility (J.A. 1294a). In other words, the pilot may not descend below 200 feet unless, at a distance of one-half mile from the end of the runway, the runway lights are clearly visible (*ibid.*).[4] It is not disputed that the responsibility for making the final decision whether to land after an ILS approach has been completed rests entirely on the pilot in command of the aircraft (J.A. 1295a).

The ILS system itself consists primarily of a "localizer beam" aligned with the center line of the

[4] A "missed approach" is a routine maneuver which can be made successfully from as low as 50 or even 25 feet in a DC-7B (App. 7a; J.A. 1295a) (see note 3, *supra*).

runway in use and a glide slope, which provide the crew with guidance up to a point about one-half mile from the threshold of the runway. By use of radar, an FAA approach controller vectors the incoming plane to a point where it intercepts the localizer beam at a distance of five to eight miles from the end of the runway; and the controller then issues an approach clearance (J.A. 1293a). The pilot then resumes full navigational control of his aircraft, although a controller continues to monitor the plane to effect separation between that flight and other known traffic (J.A. 1293a–1294a).[5] By using instruments in his cockpit, the pilot then guides the aircraft down along the localizer beam and glide slope until it reaches the "outer marker". A signal both audible and visible tells the pilot when this point has been reached (*ibid.*). At Idlewild Airport, the outer marker is 2.7 nautical miles beyond the threshold of the runway, and planes cross it at an altitude of about 747 feet (*ibid.*).

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[5] Air traffic separation is maintained by various categories of FAA air traffic controllers, those in the air traffic control center, the approach controller, the local controller, and the ground controller. In the present case, the New York center provided traffic separation to Eastern flight 512 up to and during part of the time it was in its holding pattern. Then, an approach controller took over and provided separation until the flight had intercepted the ILS approach system and had been given an approach clearance. Thereafter, the local controller had responsibility for providing separation until landing.

The local controller was in the tower cab at the top of the control tower, whereas the approach controllers worked in what is called the "IFR room" at a lower level in the tower. While there was only one local controller handling all of the arriving planes from a point on the ILS approach system to landing,

As the pilot continues down the glide path guided by his instruments, another visual and audible signal apprises him when he passes the "middle marker," six-tenths of a mile from the runway end, and when the plane is at an altitude of about 209 feet (J.A. 1294a). At this point, as the district court noted, the pilot must direct his vision outside the cockpit and determine visually if his airplane is in a proper position to land (*ibid.*). Associated with the runway are white, high-intensity approach lights, red contrast lights just prior to the runway threshold, green lights at the threshold, and additional lights outlining its path (J.A. 1293a). As noted previously, if the pilot cannot see the runway at the "middle marker" or determines that he is not properly aligned with it, he may not land but, instead, is required to execute a "pull up" or "missed approach" maneuver (J.A. 1294a–1295a).

The responsibility for directing the incoming aircraft from its holding pattern to the localizer beam is that of the FAA "approach controller." In addition to that responsibility, the FAA Air Traffic Control Procedures Manual directs approach controllers to provide certain weather information under specified conditions. In particular Section 265.2 of that manual provides that "current weather conditions, and subsequent changes, *as necessary*, shall be trans-

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at Idlewild there were three approach controllers in the IFR room manning radar scopes and handling the planes up to a point on the ILS approach system. In addition, there was a coordinator in the IFR room who was responsible for receiving weather information and disseminating it to the approach controllers (J.A. 342a–348a, 511a–514a).

mitted * * * [b]y approach control facilities, to all aircraft at the time of the first radio contact or as soon as possible thereafter * * *" (J.A. 1312a; emphasis added). This regulation, according to the uncontradicted testimony of several FAA officials, was not intended to oblige approach controllers to report *all* changes in visibility to the air traffic which they were handling. Rather, they testified that, after the mandatory initial weather transmission, the regulation required the controllers to relay only those visibility changes which necessarily had a bearing on a plane's minimum landing requirements. Visibility changes other than those transcending aircraft minimums could also be transmitted if time and the pressure of controlling other aircraft permitted the controllers to do so safely.[4]

At 9:24 P.M. on the night in question, Eastern flight 512 contacted FAA Approach Controller Ketterman, who promptly gave the crew the requisite weather information (J.A. 1313a). At 9:30 P.M. Ketterman informed flight 512 that visibility had dropped to one mile with ground fog (*ibid.*). At 9:32:49 P.M. the control room coordinator where Ketterman was stationed announced orally that visibility had de-

[4] See J.A. 431a–433a, 487a–489a, 588a, 625a, 645a–646a. To the same effect, see the testimony of then FAA Administrator Halaby, at the Hearings on Aircraft Safety before the House Committee on Interstate and Foreign Commerce, Subcommittee on Public Health and Safety, January 8–10, 1964, 88th Cong., 2d Sess., pp. 252–253. Industry understanding of the role of the FAA is in accord. See the testimony of General Seawell of the Air Transport Association of America, representing all scheduled airlines, and of the Eastern Air Lines' own Chief Meteorologist, *id.* at 78–79, 158.

creased to three-quarters of a mile (App. 10a). Ketterman, who was controlling 13 aircraft simultaneously, apparently did not hear the oral announcement because at 9:33:57 P.M. he again advised Eastern flight 512 that visibility remained at one mile (*ibid.*). The visibility drop to three-quarters of a mile was subsequently posted where the controllers could see it (App. 15a; J.A. 556a), and Ketterman did announce the change to all the aircraft he was controlling at 9:39:59 P.M. (J.A. 567a). This was, however, some 44 seconds after Ketterman had directed Eastern flight 512 to the ILS system, given it an "approach clearance," and directed it to contact the local controller for the final leg of the ILS approach and the landing (J.A. 565a-568a). The local controller was not required to—and did not—announce any weather information, but concentrated on determining whether the flight path was clear of traffic ahead of the landing plane.

The landing. Idlewild Runway Four Right was 8,400 feet long and 150 feet wide, with 25-foot asphalt shoulders on either side (J.A. 1292a-1298a). While at times earlier in the evening visibility had been quite poor, nevertheless, as the district court noted, in the 20 minutes immediately preceding the attempted landing of Eastern flight 512 on that runway, nine planes had landed on Runway Four Right without incident after making ILS approaches, including another Eastern plane which had safely landed at about 9:44 P.M., just a minute and a half before flight 512 (J.A. 1300a). At 9:45 P.M., however, flight 512 passed diagonally over the runway threshold and touched down, off the runway, 3,460 feet beyond that point and 423

to the left of the runway center line. It finally came to rest 4,360 feet from the beginning of the runway and some 610 feet to its left (App. 5a; J.A. 1292a).

Four surviving passengers, seasoned air travelers (including a licensed pilot who owned his own plane), confirmed the misaligned approach of flight 512 (App. 39a; J.A. 1300a–1301a). They testified that, despite the fog conditions, they could see the runway lights from the plane and even the painted runway markings, that they saw that the aircraft had lowered its landing gear, that it passed over the red lights just before the threshold of the runway, that its approach was angled about 20 degrees to the left of the runway axis, and that the course was not corrected before impact (J.A. 1300a–1303a). The passengers also reported that the approach itself was smooth and that no turbulence had been encountered (*ibid.*). One surviving stewardess testified that she had heard the sound of increased power being applied to the engines just before impact (J.A. 1303a), but none of the passengers reported any change in the direction or altitude of the aircraft. Examination of the wreckage revealed that the landing gear had been retracted but that sufficient power to execute a "missed approach" maneuver had not been applied to the engines (J.A. 1297a–1298a).

The decisions below. After a trial on the issue of liability, the district court found both Eastern and the government negligent and that the negligence of both defendants caused the accident. With regard to the airline, the district court concluded that Eastern did not properly inform its crew of visibility conditions and that Eastern's crew was negligent in landing the plane (J.A.

1312a-1316a). The holding of governmental negligence was premised solely upon the fact that the FAA air traffic controllers did not advise Eastern flight 512 of the reduction in tower visibility from one mile to three-quarters of a mile.

The court of appeals upheld the judgments against both defendants[7] (App. 1a). In so doing, the Second Circuit rejected the government's contention that the "misrepresentation exception" to the Federal Tort Claims Act (28 U.S.C. 2680(h)) barred the imposition of tort liability on the United States on the basis of an inaccurate weather report. The court ruled that the misrepresentation exception was substantially confined by this Court's decision in *United States* v. *Neustadt*, 366 U.S. 696, to cases involving business dealings of a financial or commercial character. The court of appeals also rejected the FAA's uncontradicted interpretation of Section 265.2 of that agency's own Air Traffic Control Procedures Manual and held—contrary to the agency's understanding—that Section 265.2 imposed a mandatory duty on FAA controllers to advise approaching aircraft of visibility changes, like the one here, even though such changes do not affect aircraft landing minimums. Finally, notwithstanding the evidence of four surviving witnesses of flight 512 that the runway was in fact clearly visible

[7] Leave to take an interlocutory appeal under 28 U.S.C. 1292(b) was duly authorized by the courts below (J.A. 1325a-1332a), as the instant trial was limited to the issue of liability only, reserving the issue of damages pending completion of appellate review.

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from the plane as it landed, the undisputed fact that the pilot alone was responsible for executing a "missed approach" maneuver if the runway was not visible to him at one-half mile, and uncontradicted testimony that Eastern pilots were expected by their employer to attempt an approach so long as visibility was above the half-mile minimum, the Second Circuit held that the FAA controller's failure to report the drop in visibility from one mile to three-quarters of a mile was a proximate cause of the accident.

REASONS FOR GRANTNG THE WRIT

I

While opening the United States to tort liability based on the negligence of federal employees, the Federal Tort Claims Act preserves, in 28 U.S.C. 2680, the government's immunity from suit on certain types of claims. In particular, Section 2680(h) excepts from the jurisdiction given to district courts under the Act "any claim arising out of * * * misrepresentation * * *." This provision has been construed by this Court and other courts to preclude suit against the United States based on negligent as well as on deliberate misrepresentations, and for failing to provide information as well as for giving inaccurate information. See, *e.g.*, *United States* v. *Neustadt*, 366 U.S. 696; *Hall* v. *United States*, 274 F. 2d 69 (C.A. 10); *Clark* v. *United States*, 218 F. 2d 446 (C.A. 9); *National Mfg. Co.* v. *United States*, 210 F. 2d 263 (C.A. 8); *Jones* v. *United States*, 207 F. 2d 563 (C.A. 2). In *Clark*, the Ninth Circuit squarely held that 28 U.S.C. 2680(h) does not allow suit against the United

States for damages caused by the negligent failure of government employees to disseminate accurate weather information. Other courts have reached the same conclusion. See *National Mfg. Co.* v. *United States*, 210 F. 2d 263, 275–276 (C.A. 8); *Bartie* v. *United States*, 216 F. Supp. 10, 20–21 (W.D. La.), affirmed without reaching the question, 326 F. 2d 754 (C.A. 5), certiorari denied, 379 U.S. 852; *Carrier* v. *United States*, 369 F. 2d 322 (C.A. 5), certiorari denied, 386 U.S. 1027.

In the case at bar, the Second Circuit held the government liable solely because an FAA employee represented the weather as allowing one mile of visibility rather than three-quarters of a mile. To avoid the apparent conflict between this holding and the decisions in *Clark* and *National Mfg. Co.*, the court of appeals relied on language in a footnote to this Court's opinion in *Neustadt*. It read the concluding footnote to that opinion (366 U.S. at 711, n. 26) as limiting the application of the misrepresentation exception to cases which involve "business dealings of a financial or commercial character with the government" (App. 24a), and thus impliedly overruling the earlier cases and making the exception inapplicable in the instant circumstances—and in a wide variety of situations where it has consistently been thought applicable.

That reading of *Neustadt*, we submit, is unwarranted for a number of reasons. In the first place, the main body of the *Neustadt* opinion cites with approval the Ninth and Eighth Circuit cases applying the misrepresentation exception in a noncommercial con-

text.[8] Secondly, the footnote itself merely restates Professor Prosser's view that the exception was "largely" limited to such circumstances—a clear implication, we believe, that the exception was not limited exclusively to matters involving "business dealings". And, of course, the question was not before the Court for resolution in *Neustadt*, since that case involved a traditional commercial warranty to which the misrepresentation exception would be applicable even under the restrictive view adopted by the court below.[9]

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[8] See 366 U.S. at 702-703, citing *Clark* and *National Mfg. Co.*, where the misrepresentation exception in 28 U.S.C. 2680(h) had been construed as barring suit against the United States on claims arising out of the allegedly negligent dissemination of weather information.

[9] In addition to relying on the *Neustadt* footnote, the court of appeals stated that "[w]here the gravamen of the complaint is the negligent performance of operational tasks, rather than misrepresentation, the government may not rely upon § 2680(h) to absolve itself of liability" (App. 24a). This language apparently relates to the same argument which the Fourth Circuit accepted—and this Court rejected—in *Neustadt*. There, plaintiff bought a house relying upon a negligently made FHA appraisal of its value. In his suit against the United States under the Tort Claims Act for damages resulting from that purchase, plaintiff alleged that the misrepresentation exception did not bar the action because the "gravamen" of his claim was the careless making of the appraisal, not the promulgation of the information itself. The Fourth Circuit allowed the suit, reasoning that "if the government assumes a duty and negligently performs it, a party injured thereby may recover damages from the United States even though the careless performance of the duty may have been accompanied by some misrepresentation of fact" (quoted at 366 U.S. 696, 705). This Court reversed, holding in effect that such a distinction did not avoid the fact that the damage alleged stemmed from the rendering of the negligent appraisal report itself, and ruling that the suit was therefore barred by the misrepresentation excep-

At least one other circuit has declined to accept the reading of *Neustadt* footnote adopted by the court below. In *DeLange* v. *United States*, 372 F. 2d 134 (C.A. 9), plaintiff's argument was identical to the rationale accepted by the Second Circuit—that *Neustadt* limited the misrepresentation exception to invasions of financial or commercial interests in the course of business dealings. Nevertheless, the Ninth Circuit ruled that the misrepresentation exception in 28 U.S.C. 2680(h) barred recovery from the United States on allegations that a government physician had negligently diagnosed and misrepresented plaintiff's illness.[10] Thus, the decision below conflicts with those rendered by other circuits both before and after the *Neustadt* decision and, in our view, is inconsistent with *Neustadt* itself. It is also obvious that the matter is one of recurrent significance.

We of course recognize, as did the Court in the *Neustadt* footnote, that many forms of negligent conduct involve elements of misrepresentation. We do not argue that Congress intended to exempt the government from liability whenever some element of misrepresentation, however slight, is present. Rather, we think a fair understanding of the exception for "misrepresentation," fully in accord with the general purposes of the Act, is that it precludes suit against the

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tion even though government employees had been careless in their task of gathering and promulgating the information for that appraisal.

[10] See also *Hungerford* v. *United States*, 307 F. 2d 99, 102–103 (C.A. 9); *Beech* v. *United States*, 345 F. 2d 872, 874 (C.A. 5); and *Steinmasel* v. *United States*, 202 F. Supp. 335, 338 (D.S.D.).

government where the claim arises directly from what is merely an oral or written communication,[11] or conduct usually thought of as a substitute for such, on the part of a government employee. As phrased by Judge Woodrough in *National Mfg. Co.* v. *United States*, 210 F. 2d at 276: "The intent of the section is to except from the Act cases where mere 'talk' or failure to 'talk' on the part of a government employee is asserted as the proximate cause of damage sought to be recovered from the United States."[12] That such an

[11] No distinction can properly be drawn, in our view, between an actual communication and a failure to communicate which implies that the information given in an earlier communication is still accurate, as to whether the misrepresentation exception applies. That kind of distinction was suggested by the district court here (App. 53a), but rejected by the court of appeals (App. 22a). In short, we see no difference in kind between a situation where a controller conveys certain information and then fails to convey changes thereto, and a situation where, at the later point, the controller negligently conveys erroneous information. Insofar as Section 2680(h) is concerned, both constitute negligent misrepresentations, in our view. See *National Mfg. Co.* v. *United States*, 210 F. 2d at 276.

[12] Properly considered, *Eastern Air Lines* v. *Union Trust Co.*, 221 F. 2d 62 (C.A.D.C.), affirmed *sub nom. United States* v. *Union Trust Co.*, 350 U.S. 907, and *United Air Lines, Inc.* v. *Wiener*, 335 F. 2d 379, 398 (C.A. 9), certiorari dismissed *sub nom. United Air Lines, Inc.* v. *United States*, 379 U.S. 951, cited by the court below (App. 24a), are not contrary holdings. Both of those cases dealt with the responsibility of the United States to effect the separation of air traffic to avoid mid-air collisions; neither involved circumstances where the conduct complained of was, as in this case, the simple giving—or the failure to give—information regarding the existence of a set of facts. Nor does *Indian Towing Co.* v. *United States*, 350 U.S. 61, point to a different conclusion. It concerned the government's liability where a navigational aid was negligently maintained, and did not involve a governmental activity essentially communicative in nature. As a result, the government did not there assert the misrepresentation exception as a defense.

approach may not in all cases provide a clear and easily definable line of demarcation does not, in our view, undermine its viability. Determining whether the misrepresentation exception applies or not is, in close cases, at best a difficult problem. The approach we suggest will at least provide a workable framework for resolving this question, and will, in our view, be the one which best reflects the congressional intent.[11] At all events, the scope of the misrepresentation exception, and the proper approach to be taken by the courts in this regard, is a matter of intrinsic importance. In our view, therefore, review by this Court in the instant case is plainly warranted.

II

As indicated above (*supra*, p. 15), we read the opinion of the court of appeals as adopting the view that the misrepresentation exception is essentially limited to situations where the communication in question is made in the context of financial or com-

[11] Whatever the precise scope of the misrepresentation exception, we doubt that the fact of a business or commercial context can provide the exclusive touchstone for determining when the exception applies. The language of 28 U.S.C. 2680(h), excepting "any claim *arising out of* * * * misrepresentation," surely suggests that the type of governmental conduct—not merely the context of such conduct—is relevant. The Senate Report on the Act characterized the exceptions in Section 2680(h) as "claims which relate to certain governmental activities which should be free from the threat of damage suit * * *." S. Rep. No. 1400, 79th Cong., 2d Sess., p. 33. Hearings on earlier bills containing similar language support this understanding of the exceptions to the Act's coverage. See, *e.g.*, Hearings before the House Judiciary Committee on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess., p. 33.

mercial dealings—a view which gives rise to conflict and which we believe unsound. However, as we observed (note 9, *supra*), there is another possible thread to the court's opinion—a suggestion that the defense is available when the essence of the communication is merely to convey information and nothing more, but unavailable when the communication is incidental to some operational activity or regulatory function which has independent purposes. Certainly, to cite a simple example, we would agree that the government could not sustain a defense based upon the misrepresentation exception when the driver of a postal truck gives an erroneous hand signal which results in an accident—a situation in which the communication is obviously ancillary to the act of driving the vehicle. We question whether this somewhat broader approach accurately reflects the *ratio decidendi* of the court below. But even if the opinion could be read in such a light, and such a reading is regarded as being reasonably in accord with the congressional intent in enacting 28 U.S.C. 2680(h), we urge that the decision below nevertheless reflects an erroneous disposition of an important question. The court of appeals, we submit, has misconceived the extent of the duties assumed by the FAA and has misconstrued the regulation which defines those duties. Its construction is plainly contrary to the settled understanding of both the FAA and the air carriers themselves. The proper delineation of these duties, we need hardly add, is important to the agency, to the carriers and to the public.

The court of appeals assumed that the air traffic approach controllers were required to report visibility changes to the crew of incoming aircraft, even

though the changes did not reflect a drop in visibility to unacceptable levels. The court concluded that this duty was imposed by Section 265.2 of the FAA Air Traffic Control Procedures Manual, which reads, in pertinent part:

> At locations where official weather reports are obtained by the controllers through routine procedures and the ceiling and/or visibility is reported as being at or below the highest "circling minima" established for the airport concerned, a report of current weather conditions, *and subsequent changes, as necessary,* shall be transmitted as follows:
>
> * * * * *
>
> B. By approach control facilities, to all aircraft at the time of the first radio contact or as soon as possible thereafter * * * [emphasis added].

A series of FAA officials, whose testimony is uncontradicted, explained the agency's consistent interpretation of this regulation (see note 6, *supra*)—that the italicized phrase in Section 265.2 makes it mandatory upon approach controllers to inform incoming aircraft only of changes in visibility which transcend the aircraft's minimum visibility for landing. A drop in visibility of this character necessarily affects a pilot's authority to make a landing approach, for the Civil Air Regulations make it unlawful to commence an ILS approach when visibility goes below a specified figure. 14 C.F.R. (Jan. 1967 rev.) § 121.651(a).[14]

[14] All references to the Civil Air Regulations are to those currently in effect. There is no substantial difference, for purposes of this case, between the current regulations and those

Other weather changes may also be reported, but only if the controller can do so consistently with the performance of his primary duties. Thus, in the instant case, the drop in visibility to three-quarters of a mile did not affect the Eastern Air Lines pilot's authority to make an ILS approach, because his aircraft's minimum landing visibility was one-half mile. In the FAA's view, the air traffic controller was therefore not expected to report that change unless his mandatory duties afforded him opportunity to do so.

Acknowledging that the phrase, "subsequent changes, *as necessary*," in Section 265.2 of the manual did not require the reporting of *"all"* changes in weather conditions, the court of appeals nonetheless substituted its own understanding of the regulation for that of the agency. In the Second Circuit's view, that section required the approach controller to report subsequent weather changes which, "under all the circumstances," the crew would have necessarily considered important in determining whether to land (App. 14a). And the court concluded that a drop in visibility from one mile to three-quarters of a mile, though not below the half-mile legal landing minimum for the incoming plane, was such a "necessary" change (*ibid.*).

The governing rule, we submit, is stated in *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-414 (upholding the Price Administrator's construction of his own regulation over the differing interpretation

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in effect at the time of the incident here involved. See generally 14 C.F.R. (1962 rev.) part 40.

placed upon it by the district court and the court of appeals):

> Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. * * * [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. * * * Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator.

See also *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 325; *Udall* v. *Tallman*, 380 U.S. 1, 16. Since the FAA's interpretation of its own regulation imposing a limited duty on air traffic controllers to advise aircraft of weather changes is neither inconsistent with the language of the regulation nor contrary to any statute, the court of appeals should have accepted that interpretation.

Moreover, the FAA's construction of the regulation is consistent with the allocation of responsibility between the commercial air carriers and that agency in air safety matters; the interpretation below is not. Under the governing Civil Air Regulations, the air carriers have responsibility for "operational control" of aircraft, *i.e.*, "authority over initiating, conducting, or terminating a flight" (14 C.F.R. §§ 1.1, 121.533). The regulations go on to provide that the carrier's dispatcher and pilot shall be jointly responsible for the dispatch release of the flight (14 C.F.R. § 121.533(b)); that the dispatcher shall be responsible for "[i]ssuing

necessary information for the safety of the flight" (14 C.F.R. § 121.533(c)(2)); that if the dispatcher believes that the flight cannot continue to operate safely as planned or released, the dispatcher is responsible for cancelling or re-dispatching it (14 C.F.R. § 121.533(c)(3)); and that during flight time the pilot in command "is responsible for the safety of the passengers, crewmembers, cargo, and airplane" (14 C.F.R. § 121.533(d)).

More specifically, with respect to the furnishing of weather information, each air carrier is required to "notify its appropriate operations personnel" of "potentially hazardous meteorological conditions." (14 C.F.R. § 121.539). And, whenever conditions exist which constitute a hazard to the conduct of safe operations, including runway conditions, it is the carrier, not the FAA, which has the responsibility for suspending operations (14 C.F.R. § 121.551).

The basic function of the FAA air traffic controllers, on the other hand, is to prevent aircraft collisions by maintaining traffic separation through a system of "clearances." The issuance of a clearance is based solely on air traffic; it is not based upon weather conditions. In fact, the FAA Air Traffic Control Procedures Manual prohibits a controller from denying a landing clearance for reasons of adverse weather.[15] Indeed,

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[15] The Air Traffic Control Procedures Manual (Pl. Exh. 38) provides:

411.1 Clearances, instructions and information issued by airport traffic controllers shall be predicated solely upon observed or known traffic or airport conditions which, in their judgment, may constitute collision hazards to air-

the testimony is uncontradicted that even if the reported visibility is below an aircraft's minimum for an instrument approach—in which case it is unlawful for the pilot to land (14 C.F.R. § 121.567)—the air traffic controllers have no authority to deny a pilot clearance if he wishes to attempt a landing approach.[16]

There is no dispute between the airlines and the FAA regarding this division of responsibility. Indeed, in recent congressional hearings on aircraft safety, representatives of the airlines and the Administrators of the FAA testified that the FAA air traffic controllers' function was to separate aircraft and prevent collision, whereas the responsibility for deciding if take-offs and landings may safely be made in light of particular weather conditions rests—and should continue to rest—with the air carriers.[17]

In addition, the court's holding increasing the responsibility of FAA traffic controllers for the dissemination of weather changes is not consistent with considerations of air safety. As noted, the principal

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craft. This may include the positions of aircraft in flight within the control zone or operating on the movement area, and observed or known vehicular traffic and temporary obstructions on or immediately adjacent to said area.

411.2 Except as set forth in 205.4 A and B, 411.4 and 431.7, *denial of clearance for an aircraft to land or take off shall be based solely on considerations of traffic* [emphasis added].

[16] See J.A. 370–371a, 571a.

[17] See Hearings on Aircraft Safety before the House Committee on Interstate and Foreign Commerce, Subcommittee on Public Health and Safety, January 8–10, 1964, 88th Cong., 2d Sess.; testimony of General Seawell of the Air Transport Association of America (representing all scheduled airlines), pp. 78–79; testimony of FAA Administrator Halaby, pp. 252–253.

responsibility of air traffic controllers is separation of air traffic so as to prevent collisions. The proper performance of this function is indispensible to air safety; not infrequently an air controller has all he can do to maintain traffic separation. In this very case, approach controller Ketterman, whose failure to inform Eastern flight 512 of the visibility change from one mile to three-quarters of a mile formed the basis of the finding of government liability, was providing traffic separation services for no less than 12 other aircraft during the 15-minute period he was handling that flight. During this 15-minute period, there were 236 separate radio transmissions between Ketterman and these aircraft. The court's requirement that controllers report visibility changes the aircraft crew would consider important requires, as a practical matter, the reporting of all weather changes. (Section 265.2 is not limited to visibility changes.) This adds immeasurably to the burden of the already heavy duties placed on controllers, especially those at our busiest airports, with no compensating increase in safe landing procedures. As we have pointed out, the pilot is already under an obligation to execute a missed approach if he cannot see the runway at one-half mile regardless of the reported visibility, and the airline expects him to attempt an approach so long as minimum visibility exists. Thus, an obligatory requirement on controllers to report all visibility changes adds to their burdens without any compensating increase in air safety.

To be sure, the FAA might modify Section 265.2 by deleting the general language, "as necessary," and instead spell out precisely what weather informa-

tion shall be given. The FAA believes, however, that the result of such an amendment will be that less rather than more weather information is furnished. The present regulation, as construed by the agency, permits flexibility, for controllers give the visibility information when landing minimums are transcended plus additional information when not under the press of duties in connection with their primary responsibility of separating aircraft. The language, "as necessary," preserves a desirable degree of flexibility in this regard. On the other hand, under a regulation stating that visibility will be given only when it transcends minimums, and that only certain other specified weather information will be given, the existing practice whereby controllers furnish additional information when in their judgment they are able to do so may well be abandoned.

The FAA believes that the present Section 265.2, as construed by the agency, is a desirable regulation—that it is flexible and best meets the needs of safety consistently with the FAA's role and capabilities. If the decision below is left undisturbed, the flexibility of the "as necessary" provision cannot be preserved. For the Second Circuit has held that it is for the courts, not the FAA, to decide what weather changes are "necessary" and must be reported. Since the FAA has no way of knowing what a court, in subsequent litigation, will decide was "necessary," the only effective way of guarding against potentially staggering liability will be to adopt more restrictive language. This, the

agency is convinced, is undesirable from the standpoint of air safety and to be avoided if possible.[18]

III

As we have attempted to demonstrate, certiorari is warranted in this case because the decision below conflicts with decisions of other circuits in its interpretation of the misrepresentation exception of the Federal Tort Claims Act and misconstrues, in a manner prejudicial to air safety, pertinent regulations of the Federal Aviation Agency. There is an additional reason justifying this Court's review; the holding below that an FAA controller's failure to transmit certain weather information was the proximate cause of the accident in suit is totally without foundation.

We of course realize that it is not this Court's gen-

[18] While in this case the courts below purported to invalidate only the FAA's interpretation of its own regulation rather than the regulation itself, in fact this amounts to an overruling of the administrative policy embodied in the regulation. We think it settled that Congress intended to preclude examination of the validity or propriety of administrative regulations in tort suits against the government. See 28 U.S.C. 2680(a); *Dalehite* v. *United States*, 346 U.S. 15, 33; *Powell* v. *United States*, 233 F. 2d 851, 854 (C.A. 10); *Weinstein* v. *United States*, 244 F. 2d 68, 71 (C.A. 3). See also H. Rep. No. 2245, 77th Cong., 2d Sess., p. 10, pointing out: "Nor is it desirable or intended that the * * * legality of a rule or regulation should be tested through the medium of a damage suit for tort." To the same effect, see S. Rep. No. 1196, 77th Cong., 2d Sess., p. 7. We submit that the decisions below were not based on the improper handling by the air controller of the operational details of his job. Rather, the decision rests on the courts' disagreement with FAA's policy of not requiring the reporting of weather changes of the type involved here. Section 2680(a) of Title 28, properly construed, precludes a holding of government liability on this kind of basis.

eral practice to review factual findings concurred in by two lower federal courts. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275. The Court has not, however, applied that rule of judicial administration so mechanically as to avoid "the task of examining the foundation for findings in a particular case." *Baumgartner* v. *United States*, 322 U.S. 665, 670. That such examination is called for in this case, we submit, is made clear by the opinion of the court below.

The court of appeals itself recognized that "the asserted liability of the government was based on the claim that poor visibility was a factor in the crash * * *" (App. 2a). But, in holding Eastern Air Lines negligent because its crew continued its approach after losing alignment with the runway, the court relied heavily on the testimony of a surviving passenger who was himself an experienced aviator. This passenger, whom the court of appeals itself characterized as "trained to observe details," "assiduously observed the plane's landing approach" (App. 4a). As the court of appeals also recognized, this passenger was able to see—and did see—not merely the runway lights, but even the painted lines on the runway itself (*ibid.*). Three other passengers testified to similar observations (J.A. 1300a–1303a). If the visibility was as good as these witnesses testified—and the courts accepted this testimony as the principal basis for holding Eastern liable for a negligently effected landing (App. 4a–5a)—then the same court's findings that insufficient visibility caused the accident are not credible. The portion of the court of appeals' opinion describing how well one on board the plane could see cannot

be reconciled with the portion holding that the government employee's conduct proximately caused the accident. The testimony of the surviving passengers and the testimony of pilots who landed on the same runway minutes before flight 512 demonstrate beyond doubt that the accident was not caused by insufficient visibility.

Secondly, in deciding that the failure of the FAA to advise the pilot of the reductions in visibility from one mile to three-quarters of a mile was a proximate cause of the accident, the court of appeals reasoned (App. 18a–19a):

> This information would have signaled to the pilot that a missed approach might have to be executed. Indeed, as we have noted, the evidence discloses that on the evening of the crash several pilots were forced to execute missed approaches even though the controlling visibility was reported as being above minimums.

However, earlier in the opinion, the court pointed out that while he was in his holding pattern, the pilot of Eastern flight 512 "was advised that 'there was pretty bad fog on the airport,' and that as a result 'some [planes] are making it and some are not' " (App. 3a). At another point in its opinion the court stated that the "crew was informed of the adverse weather conditions which existed at Idlewild, and of the possibility that they might have to divert to Philadelphia" (*ibid.*). In addition, when the crew of Eastern flight 512 commenced its approach, the Captain announced to the passengers that they would "try" an approach and would either be on the ground or would execute a missed approach and proceed to Philadelphia (J.A.

1109a-1110a). Moreover, as the court of appeals stated in its opinion (App. 7a), "the missed approach maneuver is basic to safe flying and one with which all commercial pilots must be completely familiar," and was a procedure "well-known to the crew." These facts, as acknowledged in the opinion of the Second Circuit, demonstrate that the pilot of Eastern flight 512 was *fully* aware of the possibility of having to make a missed approach at the time he commenced his landing. They cannot be reconciled with the court of appeals' reasoning that if the pilot had been advised of the one-quarter-mile reduction in visibility, "this information would have signaled to the pilot that a missed approach might have to be executed" (App. 18a).

Finally, as we described above (*supra*, p. 9), the pilot of Eastern flight 512 was required to decide as he passed over the "middle marker"—on the basis of what he could see outside his cockpit—whether or not he would attempt a landing. The Civil Air Regulations made it unlawful to land—and Eastern's regulations forbade him from doing so—if at this point, one-half mile from the runway and at an altitude of 200 feet, the pilot could not see the runway. And, as the Second Circuit noted, Eastern's own witness conceded that at this point the pilot had ample leeway to execute a missed approach maneuver successfully (App. 7a). In these circumstances, the uncontradicted fact that the pilot attempted a landing makes it clear, we submit, that the courts below were plainly mistaken in believing that the failure to advise him of a drop in visibility to a point *not* below Eastern flight 512's landing minimum contributed to the accident.

In view of the press of cases on the Court, we generally refrain from urging review in cases which only present issues of a primarily factual character. In this case, however, we think the two legal issues discussed earlier plainly warrant the Court's consideration. In light of the internal inconsistencies in the opinions of the courts below as to whether the government's conduct proximately caused the accident, the consideration that many of the factors underlying those legal questions relate also to the issue of "proximate cause," and the fact that the potential liability in damages here is extremely large,[19] we believe that a grant of certiorari to review the entire case, including the question of proximate cause, is merited.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1967.

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[19] The total amount claimed as damages arising from the accident, to which the government has been found liable and not entitled to indemnity, exceeds $15,000,000.

APPENDIX

United States Court of Appeals for the Second Circuit

Nos. 273, 274—September Term, 1966.

(Argued December 13, 1966; Filed February 14, 1967.)

Docket Nos. 30785, 30786

GRACE A. INGHAM, AS EXECUTRIX OF THE ESTATE OF PAUL B. INGHAM, DECEASED, PLAINTIFF-APPELLEE

v.

EASTERN AIR LINES, INC., DEFENDANT AND THIRD PARTY, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, THIRD PARTY DEFENDANT-APPELLEE

GRACE A. INGHAM, AS EXECUTRIX OF THE ESTATE OF PAUL B. INGHAM, DECEASED, PLAINTIFF-APPELLEE, and RITA FREEDMAN, AS ADMINISTRATRIX OF THE ESTATE OF MILTON FREEDMAN, DECEASED, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT AND THIRD PARTY PLAINTIFF-APPELLANT

v.

EASTERN AIR LINES, INC., THIRD PARTY DEFENDANT-APPELLEE

Before: WATERMAN, MOORE and KAUFMAN, *Circuit Judges.*

KAUFMAN, *Circuit Judge:* During the past half century we have witnessed the metamorphosis of air travel from a pioneering effort to a mode of transportation that is commonplace for millions of Americans. Yet despite the phenomenal advances which have been made in the technology of the industry, airplane crashes, often unexplained, continue to distress us.

The present suits arose from a plane crash which occurred at Idlewild International Airport (now Kennedy International Airport) on the evening of November 30, 1962. Eastern Air Lines, Flight 512 (hereafter referred to as EAL 512), en route from Charlotte, North Carolina to New York City, crashed while attempting to land on Runway 4 Right, which at the time of the accident was engulfed in swirling ground fog. Twenty-one passengers and 4 crew members perished, while some 28 to 30 other persons were injured.

Numerous separate actions were filed in the District Court against Eastern Air Lines (Eastern) under the court's diversity jurisdiction, and against the United States under the Federal Tort Claims Act, 28 U.S.C. § 1346(b). Eastern's alleged liability was premised in the main on allegations that the crew of EAL 512 failed to exercise due care in operating the aircraft. and that this negligence was one of the causes of the tragedy. The asserted liability of the government was based on the claim that poor visibility was a factor in the crash and that a substantial contributing and concurrent cause of the accident was the negligence of the Air Traffic Controllers and the United States Weather Bureau observer in failing to provide accurate and up-to-date weather information.

The present actions, one against Eastern and one against the government, with each defendant filing third party claims against the other for indemnity, were selected as "test cases" to determine the issues of liability and the right to indemnity.[1] The parties waived a jury, and the cases, limited to the issues of liability and indemnity, were tried by Judge Abruzzo. After 19 trial days, the court filed its opinion in which it found that the accident had occurred because of the concurrent negligence of Eastern and the government. It also found that neither defendant was entitled to indemnity from the other. The court properly certified these cases for appeal under 28 U.S.C. § 1292(b), and we subsequently granted leave to Eastern and the government to prosecute these interlocutory appeals.

In order to unravel the rather complicated issues which confront us, we will first discuss Eastern's liability, then proceed to consider the liability of the government, and finally examine both defendants' claims that they are entitled to indemnity.

EASTERN'S NEGLIGENCE

1. THE APPROACH

The facts, as developed at trial, reveal that EAL 512, a DC–7B four-engine aircraft, arrived over the New York City area at approximately 9:00 P.M. on November 30, 1962. The crew previously had been informed that due to adverse weather conditions the flight might have to be diverted to Philadelphia. While in its holding pattern, the aircraft was advised that "there was pretty bad fog on the airport," and that as a result "some [planes] are making it and some are not."

[1] Many of the plaintiffs in the other actions signed stipulations agreeing to be bound by the decisions on liability in the present cases.

At approximately 9:37, Approach Controller Ketterman, an employee of the Federal Aviation Agency (FAA), cleared EAL 512 for an instrument landing system (ILS) approach to Runway 4 Right.[2] Such an approach required the controller to guide the aircraft by radar until the plane intercepted a localizer beam, at which point the crew assumed full navigation of the plane.

It is an extraordinary circumstance that one of the fortunate passengers who survived the crash, assiduously observed the plane's landing approach. Such eye-witness evidence, usually lacking in airplane crash cases, is especially valuable in determining whether the crew performed in a negligent manner.

The witness, Frank Kolarek, who had occupied a window seat in the rear of the plane, provided detailed testimony dealing with EAL 512's landing approach. It was a coincidence that the witness was a licensed pilot who owned his own plane. He also had taken over 100 commercial flights. A motion picture cameraman by trade, he was trained to observe details and, indeed, did. Kolarek testified that he saw EAL 512 cross Runway 4 Right from the left at an angle over the red lights which mark the beginning of the runway. Despite the apparent lack of alignment with the runway, the plane continued its fatal approach. Its position was evidently not corrected, for as Kolarek went on to testify, the plane was not aligned with the painted white lines

[2] There are various categories of air traffic controllers: the Air Traffic Control Center Controllers, the Approach Controllers, and the Local Controllers. In the present case, the New York center was in contact with Flight 512 up to and during part of the time that it was in its holding pattern. Then the flight was turned over to Approach Controller Ketterman, who guided it into its ILS approach, at which time a Local Controller took over.

he observed on the runway, but instead proceeded at an angle of 20° to the left of these lines.

Kolarek's damaging testimony was not the only evidence indicating that the plane was improperly aligned during its attempted landing. The physical facts of the crash, which were stipulated to by Eastern at the trial, revealed that Runway 4 Right was 150 feet wide with 25 feet of asphalt shoulders on either side. Despite the width of the runway, the plane made its initial impact at a point 423 feet to the left of the center line of the runway (348 feet from its extreme left side), while the main portion of the wreckage came to rest 610 feet to the left of the center line (535 feet to the left of the runway's edge). The mute wreckage of the aircraft thus corroborated Kolarek's testimony that EAL 512 crossed the runway at an angle from the left, and continued its approach despite its improper alignment. With this and other evidence which we need not repeat properly before him, Judge Abruzzo correctly concluded that Eastern, which was responsible for the safety of its passengers,[3] was negligent in continuing its landing approach after losing alignment with the runway.

2. THE "MISSED APPROACH"

The case against Eastern, however, was not restricted to evidence that the plane was improperly aligned. It also appeared that when the crew finally decided to terminate the improper approach, the

[3] Civil Air Regulations promulgated by the Aeronautics Board reveal that the safety of the passengers is at all times the responsibility of the carrier. Section 40.351 provides:

(c) *Responsibility of pilot in command.* The pilot in command shall during flight time be in command of the airplane and crew and shall be responsible for the safety of the passengers, crew members, cargo and airplane.

"missed approach" maneuver was performed in a negligent manner.

We have already noted that when an airplane executes an ILS landing it is guided by radar until it intercepts a localizer beam. This interception, it appears, occurs at a point beyond the runway's so-called "outer marker." If the aircraft remains on the localizer beam, a visual display and audible signal will occur in the cockpit when the plane passes over the outer marker. The crew thereby is informed that the airplane is 2.7 nautical miles from the runway's threshold, on an extended center line, and that the plane's altitude is 747 feet. Upon passing the so-called "middle marker," a similar display and signal occur, which alert the crew that the plane is then six-tenths of a nautical mile from the beginning of the runway and 209 feet above it. It is at this point—the middle marker—that a critical operation is to be performed. The pilot must direct his visual attention outside the cockpit to determine if his craft is in a proper position to land. If, as a result of this action, he concludes that the airplane is not properly positioned, he must execute what is referred to as a "missed approach."

This procedure we have outlined is necessary, we are told, because pure instrument landings are not feasible; the pilot must be able to see the runway in order to land his plane safely. Accordingly, each category of aircraft has a specified minimum visibility requirement which must be met before the pilot may attempt a landing. The specified minimums for EAL 512—a DC-7B—were a ceiling of 200 feet and one-half mile of visibility. Thus, the runway had to be clearly visible to the pilot when the plane was one-half mile from the threshold of the runway and 200 feet above the ground. This distance corresponded to

the middle marker, and it is for this reason that the pilot should have made his observations when the plane passed that point.

Eastern's Flight Operations Manual clearly specifies that "a missed approach will be executed when visual contact has not been established when minimums have been reached or at any time visual contact is lost after descent has been made to minimums." And Eastern conceded that it was possible to make a missed approach from as low as 50 feet, while Captain Krasky, Eastern's Manager of Flying, testified that he had executed missed approaches from as low as 25 feet.

It is clear from all the testimony that the missed approach maneuver is basic to safe flying and one with which all commercial pilots must be completely familiar. Indeed, the procedures for its execution were detailed in Eastern's DC–7B Flight Manual. Briefly, it stated that the captain must first apply or call for power, usually METO power (maximum except take-off) although with flaps and gear down and the speed reduced for landing, T. O. power (take-off) may be required. It continued that, as power was applied, the nose of the aircraft should be raised, and when a positive rate of climb was achieved, the wing and flaps should be returned to take-off position,[4] and the gear should be brought up. Captain Krasky was clear in his testimony that the flaps and gear should never be retracted before a positive rate of climb had been established; otherwise, the aircraft will descend at an even greater speed.

Despite these established procedures, which were well-known to the crew, it has been conceded by East-

[4] During the landing approach, the flaps should be either at 30° or 50°. The missed approach procedure calls for the flaps to be returned to the take-off position of 20°.

ern that at the time of initial impact with the ground not a single one of EAL 512's four engines was producing power equal to METO.[8] Moreover, the landing gear, which Kolarek specifically stated had been lowered, was found fully retracted, while the wing flaps were in take-off position. Theodore Perry, Eastern's expert witness, testified that it would take at least nine seconds to raise the flaps and gear. Surviving passengers, however, testified that they had felt the thrust of the engines only three to five seconds before impact, thus indicating that the flaps and gear were raised *before* additional power was provided. These facts, plus other evidence introduced at the trial, support Judge Abruzzo's finding that the crew of EAL 512 deviated from the procedures for a missed approach established by Eastern's own Flight Operations Manual. It was within the province of the judge to conclude that the failure to follow these instructions constituted conduct which did not measure up to the proper standard of care. See, e.g., *Citrola* v. *Eastern Air Lines, Inc.*, 264 F. 2d 815 (2d Cir. 1959); *Danbois* v. *New York Cent. R.R. Co.*, 12 N. Y. 2d 234 (1963). We are unable, therefore, to fault Judge Abruzzo's finding that the crew of EAL 512 negligently and improperly executed a missed approach.

3. THE BIRD STRIKE THEORY

Unable to explain the crew's inability to land the plane safely, Eastern propounded the engrossing theory that the accident was caused by a "great black

[8] According to Eastern's Manual, METO power is 2600 RPM's and 2700 brake horsepower, while T. O. is 2900 RPM's and 3250 brake horsepower. At the time of impact, however, the four engines were producing 2474, 2445, 2453 and 2422 RPM's respectively, and 2290, 2170, 1990 and 2135 brake horsepower. Surviving passengers stated that they felt a surge of power just before impact, but that the plane did not gain altitude.

backed gull" striking the airplane. Apparently conceding that a 3 to 5-pound bird could not knock its 96,000 pound airliner from the sky, Eastern instead argued that the collision with the gull may have distracted the crew just long enough to make it impossible to execute a missed approach.

The difficulty with Eastern's bird strike theory is that it is highly conjectural and not supported by any convincing evidence. It is true that the carcass of a gull was discovered on the afternoon following the crash, at a point approximately 3700 feet from where the airplane made its initial impact. But the mere presence of a dead bird near the scene of the crash is hardly convincing proof that it was the cause of the accident. In fact, the evidence indicated that the death of the gull and the crash of the plane were totally unrelated. No feathers or other bird remains were found on the wreckage of the aircraft, nor were any metal fragments or paint found on the carcass of the gull. Moreover, a member of the Armed Forces Institute of Pathology who examined the dead bird concluded that it had been dead 3 or 4 days before the crash occurred. Confronted with these facts and testimony we cannot say that Judge Abruzzo was clearly in error when he rejected Eastern's bird strike defense.

THE GOVERNMENT'S NEGLIGENCE

1. THE DUTY TO REPORT WEATHER CONDITIONS

We now turn our attention to the evidence that was introduced to prove negligence on the part of the government. As we have previously noted, EAL 512 received various weather advisories as it approached New York City and circled above in its holding pattern. The crew was informed of the adverse weather conditions which existed at Idlewild, and of the possi-

bility that they might have to divert to Philadelphia. The flight eventually came under the direction of controller Ketterman, who, as we have noted, was an FAA employee. He advised the crew shortly after 9:24 p.m. that the weather at Idlewild was "sky partially obscured, visibility one and one-half miles with fog." The visibility subsequently decreased to one mile, and Ketterman reported this fact at about 9:30 to the planes with which he was in communication.

At exactly 9:32:49—the precise moments being of some importance to this phase of the case—Kelley, the coordinator in the "IFR Room,"* and also an FAA employee, was disseminating weather information to the various controllers, and announced in a "louder than normal voice" that the tower reported a further reduction in visibility to three-quarters of a mile. Despite this announcement Ketterman advised the crew at 9:33:57—more than a minute after Kelley's announcement—that the visibility was still one mile. This erroneous report of existing weather conditions was the last weather information relayed to the crew before the plane crashed 12 minutes later at approximately 9:45.

After reviewing this evidence, Judge Abruzzo decided that the government had breached its duty to report accurately current and changing weather conditions to the crew, and that this failure was the proximate and contributing cause of the accident. This duty he found set forth in § 265.2 of the Air

*"IFR" stands for "instrument flight rules." The approach controllers work in what is known as the "IFR Room," which is at a lower level than the tower cab where the local controller is located. Kelley, the coordinator in the IFR Room, was responsible for receiving weather information and disseminating it to the approach controllers.

Traffic Control Procedures Manual of the FAA which provides:

> At locations where official weather reports are obtained by the controllers through routine procedures and the ceiling and/or visibility is reported as being at or below the highest "circling minima" established for the airport concerned, *a report of current weather conditions, and subsequent changes, as necessary,* shall be transmitted as follows:
>
> * * * * *
>
> B. By approach control facilities, to all aircraft at the time of the first radio contact *or as soon as possible thereafter,* * * * (emphasis added).

The district judge concluded that the controller's failure to report the change in visibility from one mile to three-quarters of a mile was a breach of the provisions of § 265.2, because this was "necessary" information which should have been conveyed to the crew "as soon as possible." The omission by the controller, the judge determined, constituted evidence of negligence on the part of the government.

The government challenges this holding. Relying on a myriad of complex regulations, it argues that the basic responsibility for supplying weather information to the crew and for insuring that visibility is adequate for a safe landing, belongs to the carrier, while the main function of the Air Traffic Controllers is to maintain traffic separation and to prevent mid-air collisions. This contention, however, blinks at the question, since it is undisputed that § 265.2 requires the controller to transmit *some* weather information. The issue, as we see it, therefore, is not *whether* the government had a duty to provide such information, but rather what was the *scope* of that duty.

Before we determine what weather conditions should have been reported, it is necessary to have an understanding of the method employed to measure visibility. On the night of the accident, three kinds of visibility observations were being made at Idlewild. A special electronic device known as a Runway Visual Range (RVR) was measuring the horizontal visibility in the area near the threshold to Runway 4 Right. The RVR consists of 2 components—a projector and a detector. They measure the transmissivity—the ability of the air to transmit light—of the atmosphere between the two components. The information is transmitted to the Weather Bureau office where it is computerized and conveyed to the tower for use by the controllers. The RVR, designed to report what a pilot in a moving aircraft will see, took observations every minute. Ordinarily, these are the controlling observations and they determine whether the visibility is adequate for landing. On the evening of the accident, the RVR reported values of less than 1000 feet—well below EAL 512's minimum landing requirement. Earlier that evening, however, the RVR had been declared inoperative because of some mechanical failure.[1]

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[1] The RVR is equipped with a special warning device to report the possibility of transmission errors. The warning consists of "red balls," which are red over-lights superimposed on the readings that are transmitted. At approximately 8:35 on the evening of the crash, Keepers, the Watch Supervisor, observed a "red ball" on the values coming from Runway 4 Right and displayed in the IFR Room. Despite attempts to locate the difficulty, the "red balling" continued until 10:10. During the intervening period, Bradley, the Weather Bureau observer whose job it was to decide if the RVR system was to be declared inoperative, decided that it was, and took it out of operation.

Plaintiff-appellee contends that the government's employees acted negligently, and that as a result the RVR system was not

Visibility observations (surface visibility) were also taken by the U. S. Weather Bureau observer at or near ground level. During the critical period of approximately 12 minutes when no weather conditions were reported to the crew, these observations indicated that the visibility of Runway 4 Right had declined to one-quarter of a mile—also below the plane's minimum requirement for landing.

The third set of observations (tower visibility) were taken by an FAA employee in the tower cab at the top of the control tower. These observations—the only ones which remained above the aircraft's minimums—were being reported to incoming aircraft by the controllers.[8]

The government's position, succinctly stated, is that § 265.2 required the approach controller to advise pilots of changed conditions only when the controlling visibility fell below the aircraft's minimum landing requirement. Since EAL 512's minimum was one-half mile, and since the controlling visibility was above that figure, the government contends that Ketterman was under no obligation to inform the crew of the drop from one mile to three-quarters of a mile.

We are unable to accept the government's inordinately narrow interpretation of the phrase "current

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in operation at the time EAL 512 made its landing approach. Judge Abruzzo rejected this claim, and we agree with him that under the existing regulations the employees acted in a reasonably prudent manner.

[8] Plaintiff-appellee contends that under existing weather conditions at the time of the accident, surface visibility rather than tower visibility should have been controlling. The District Court did not rule on this issue, the resolution of which depends on whether the tower cab was above the fog. At trial, conflicting evidence was introduced on this question. Since we conclude that the government was negligent even if the tower observations were controlling, we do not reach this contention.

weather conditions, *as necessary*" (emphasis added). The government is of course correct when it argues that § 265.2 did not require it to report *all* changes in weather conditions. The words "as necessary" must be read to have some meaning. But because the government was not required to report all changes, it did not follow as a matter of course that it was obliged to report only those changes which occurred when weather conditions had descended below required minimums. A more meaningful and reasonable interpretation of § 265.2, we believe, is that it required the approach controller to report those subsequent changes which, under all the circumstances, the crew would have considered important both in determining whether to attempt a landing, and in preparing for the weather conditions most likely to be encountered near the runway. In our view, a drop in visibility of *25%*, from one mile to three-quarters of a mile, bringing existing weather conditions dangerously close to landing minimums, is such a critical change that, in the interests of safety, it should have been reported to the crew of EAL 512.

This is especially true in view of the fact that the Weather Bureau observer had reported visibility to be one-quarter of a mile—less than EAL 512's required landing minimum. Moreover, he informed the IFR Room that the portion of the sky obscured by fog and clouds had increased from two-tenths to eight-tenths; and other pilots had reported considerable difficulty in landing and taking off due to the adverse weather conditions. Indeed, the approach controllers were aware that some pilots even had been forced to execute missed approaches. Assuming, *arguendo*, that this supplemental information did not have to be reported to the crew, it should have indicated to controller Ketterman that weather conditions were deteriorating

seriously, and that the tower visibility reading of *three-quarters of a mile* might not truly reflect the conditions which an incoming pilot would encounter. At the very least, however, the RVR and surface visibility readings should have made it plain that the *one mile* figure which had been reported to the crew was deceptive, and that more current information was "necessary" and properly should be provided.[9]

Our conclusion that the change in visibility should have been reported is in tune with the heavy degree of reliance which passengers place upon the government for insuring the safety of their flights. While air travel in this jet age has become commonplace, we know too well that there is always lurking the possibility of tragic accidents capable of snuffing out the lives of hundreds in a mere matter of seconds. Much of the success in preventing such disasters can be attributed to the federal government's assumption of the

[9] It is of interest that Nelson and Speiselman, the other two approach controllers on duty with Ketterman, did report the drop in visibility to other aircraft soon after it was announced. It is true that they were handling fewer aircraft than was Ketterman; nevertheless, the fact that the other controllers believed that the drop in visibility was important enough to report to the aircraft with which they were communicating, is some evidence that Ketterman was negligent in not immediately reporting this information to the flight.

The government argues, however, Ketterman did report the change in visibility when he saw it posted on the sheet before him. By that time, though, EAL 512 had been given an approach clearance and had been turned over to the local controller; therefore, the government contends, Ketterman was not able to advise the crew of the reduced visibility. This argument, however, is without merit. As we have previously noted, Kelley, the IFR Room coordinator, in a "louder than normal voice," announced the change in visibility to all three controllers. When this announcement was made, Ketterman was still in contact with EAL 512, and thus had sufficient opportunity to relay this information.

supervision of commercial flying; and public confidence in air travel has been fostered in large measure by knowledge that our government, recognizing the high stakes involved, is constantly overseeing the carrier's operations in order to promote safety.

Moreover, we can give little weight to the government's claim that since its initial decision to provide weather information was a gratuitous one, it could proceed with impunity to violate its own regulations and act in a negligent manner. Dean Prosser has put this doctrine to rest in his treatise: "[T]he good Samaritan who tries to help may find himself mulcted in damages, while the priest and the Levite who pass by on the other side go on their cheerful way rejoicing." Prosser, Law of Torts 333 (3d Ed. 1964).

It is now well established that when the government undertakes to perform services, which in the absence of specific legislation would not be required, it will, nevertheless, be liable if these activities are performed negligently. Thus, for example, though the government may be under no obligation in the absence of statute to render medical care to discharged veterans, when it decides to provide such services and does so negligently, it has been held liable under the Tort Claims Act. *United States* v. *Brown,* 348 U.S. 110 (1954).

Assuming, *arguendo*, that in the absence of FAA regulations approach controllers would not have to advise incoming aircraft of weather conditions, the decision to provide such information would lead carriers and their pilots normally to rely on the government's performance of this service. The carriers, relying on the FAA to keep their pilots informed of current weather conditions, would be likely to reduce both the quantity and quality of their own weather reporting. In light of this reliance, it is essential that

the government properly perform those services it has undertaken to provide albeit voluntarily and gratuitously. In any event, the failure of the government to inform the crew that the visibility had dropped from one mile to three-quarters of a mile was a violation of § 265.2's command that "subsequent changes, as necessary, shall be transmitted," and Judge Abruzzo properly concluded that this omission constituted negligence on the part of the government.[10] See *Citrola* v. *Eastern Air Lines, supra; Danbois* v. *New York Cen. R.R. Co., supra.*

2. PROXIMATE CAUSE

The government argues, however, that even assuming it breached its duty to the passengers by failing to report weather conditions, the omission was not the proximate cause of the accident. We cannot agree. We note that the district judge found that if the crew had been notified of the changing weather conditions, the pilot might have decided to divert to Philadelphia rather than to attempt an ILS landing

[10] In its brief, plaintiff-appellee urges that the government should also be held negligent because it failed to observe and report the so-called "quadrantal visibility," which plaintiff-appellee contends was below EAL 512's authorized landing minimums. Quadrantal visibility is a weather condition where the visibility in one section of the airport is different, by one-eighth of a mile or more, from the prevailing visibility. If the quadrantal visibility is in the quadrant of the airport where an airplane is to land, it controls, and if below minimums, an approach is prohibited. Plaintiff-appellee contends that there was quadrantal visibility in the area of the airport where EAL 512 was to land. This visibility, it claims, was below one-half mile so that an approach would not have been permitted had the Weather Bureau observers reported the visibility. The District Court's opinion did not consider this claim, and we do not reach it since we have already concluded that the government was negligent on other grounds.

at Idlewild. Moreover, the judge observed, if the crew had known of current conditions, they might have maneuvered the plane differently, and could have been ready and able at an earlier time to execute a missed approach.

These findings by the judge are not clearly erroneous. While Eastern expected its pilots to land if the visibility was above the craft's required minimums, the pilots were not required to do so. The final decision either to attempt a landing or divert to another airport was in the hands of the pilot. This is quite properly so since he is in the best position to observe and judge the actual effect of the weather on the plane's landing approach. If the pilot does decide to attempt a landing, information concerning recent and significant changes in weather conditions is essential to his mental computations and the exercise of his judgment. As we have noted, Eastern's Flight Operations Manual specifies that a missed approach *must* be executed if visual contact is lost after the aircraft has passed the middle marker; but the pilot has little guarantee of successfully performing this maneuver once the plane has gone much below 50 feet. A missed approach required precision coordination by the crew, and the success or failure of the operation, when the plane was at a very low altitude, depended on just how rapidly the crew reacted. Thus, it was of the utmost importance that the crew not be lulled into a false sense of security. The pilot should have been told that weather conditions were becoming marginal, and that he might well encounter less than minimum visibility upon reaching the runway. This information would have signaled to the pilot that a missed approach might have to be executed. Indeed, as we have noted, the evidence discloses that on the evening of the crash several pilots were forced to execute missed

approaches even though the controlling visibility was reported as being above minimums.

In light of these circumstances, we agree that the negligent failure of the government to inform EAL 512 that visibility had dropped to three-quarters of a mile—only slightly above the craft's minimum—was a proximate and concurrent cause of the accident.[11]

3. DEFENSES BASED ON THE TORT CLAIMS ACT

Falling back on its second line of defenses, the government argues that even if it did breach a duty, and even if that breach was the proximate cause of the accident, nevertheless, the facts of the present case bring this action within several of the exceptions to the Tort Claims Act, and therefore the government

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[11] We reject the government's contention that under New York law it must be relieved of liability because the failure of the crew to execute properly a missed approach was an intervening superseding cause. This Court has held:

> [I]t is not the law of New York that the intervention of a succeeding fault as such gives immunity to an earlier wrongdoer. The presence of the second wrongful act in the chain of circumstances which leads from the wrongful act to the injury is legally irrelevant, unless its occurrence is so unexpected that the injury is not to be a reasonably foreseeable result of the first act. The question must be determined as though the second act were itself innocent. Person v. Cauldwell, 176 F. 2d 237, 241 (2d Cir.) (L. Hand, J.), *cert. denied*, 338 U.S. 886 (1949). See also Ammar v. American Export Lines, 326 F. 2d 955 (2d Cir.), *cert. denied*, 379 U.S. 824 (1964).

We are unable to conclude that the accident was not reasonably foreseeable as a result of the government's negligent failure to provide up-to-date weather information. Indeed, the government was the original wrongdoer whose negligence set in motion the entire chain of events which finally culminated in the tragic crash. The government's negligence was ever present.

is exempt from liability. We are referred to 28 U.S.C. § 2680, which provides in part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claims based upon an *act or omission* of an employee of the Government, exercising due care, *in the execution of a statute or regulation,* whether or not such statute or regulation be valid, or based upon the *exercise or performance of the failure to exercise or perform a discretionary function* or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. (Emphasis added.)
>
> * * * * *
>
> (h) Any claim arising out of * * * misrepresentation * * *.

Based on this section the government raises three separate contentions.

a. *"Execution of a Regulation" Exception.*—The government claims that it may not be held liable because the purpose of excepting acts or omissions which occur as part of the execution of a regulation is to bar "tests by tort action of the legality of . . . regulations," *Dalehite* v. *United States*, 346 U.S. 15, 33 (1953); and, the government argues, we have in effect invalidated § 265.2. This position is without merit. We have not questioned the validity of that section, but instead have determined that this regulation was violated because "necessary" weather information was not provided.

The government's argument might have merit if § 265.2 stated that the controller shall advise incoming flights of changes in weather conditions "only when the controlling visibility falls below the flight's minimums." If such language were contained in the regulation, then the execution of a regulation exception

would prevent us from finding the government negligent if its controller failed to report weather changes when the visibility was above the minimums. But § 265.2 is not so phrased; instead, it provides that the controller shall advise of weather changes "as necessary." Therefore, in order to determine whether there had been compliance with this regulation, it was necessary for us to decide whether the weather information which the controller failed to report was "necessary." And having determined that "necessary" information was not reported, the inescapable conclusion is that the regulation was violated. The government cannot, therefore, disclaim its liability on the ground that the omission occurred in the execution of a regulation, for, in fact, it failed to comply with the regulation by omitting to furnish necessary information.

b. *The "Discretionary Function" Exception.*—The government also argues that reporting weather changes to incoming flights when the visibility is above the minimums is a "discretionary" function and therefore under § 2680(a) it cannot serve as the basis for imposing tort liability. This argument also lacks merit. When the government decided to establish and operate an air traffic control system, that policy decision was the exercise of "discretion" at the planning level, and could not serve as the basis of liability. See *Dalehite* v. *United States, supra.* But once having made that decision, the government's employees were required thereafter to act in a reasonable manner. A failure to do so rendered the government liable for the omission or commission. *Indian Towing Co.* v. *United States,* 350 U.S. 61 (1955). Thus, it has been decided that the government can be held liable for the negligence of its air traffic controllers. See *Eastern Air Lines* v. *Union Trust Co.,* 221 F. 2d 62 (D.C.

Cir.), *aff'd sub nom., United States* v. *Union Trust Co.*, 350 U.S. 907 (1955). "[D]iscretion was exercised when it was decided to operate the tower, but the tower personnel had no discretion to operate it negligently," 221 F. 2d at 77.

In the present case, even if we were to assume that the creation of the FAA regulations was a discretionary function, it is true nevertheless that no discretion was left to the controller as to whether to comply with § 265.2 once it was promulgated. The section required the controller to report "subsequent changes, as necessary" and his failure to report such changes cannot be viewed as "the failure to perform a discretionary function or duty."

c. The Misrepresentation Exception.—The government's final argument under the Tort Claims Act is that the negligent failure of its employees to convey weather information was a "misrepresentation" which cannot serve as the basis for liability. 28 U. S. C. § 2680(h), *supra*. It is true, as the government contends, that the misrepresentation exception of the Act applies to negligent as well as to intentional misrepresentations. *United States* v. *Neustadt*, 366 U. S. 696, 702 (1961). Moreover, we agree that a misrepresentation may result from the failure to provide information, as well as from providing information that is wrong. See *National Mfg. Co.* v. *United States*, 210 F. 2d 263, 276 (8th Cir.), *cert. denied*, 347 U. S. 967 (1954). Nevertheless, the government's reading of the misrepresentation exception is much too broad, for it would exempt from tort liability any operational malfunction by the government that involved communications in any form.

The government concedes there are diverse kinds of negligence which could be said to involve an element of misrepresentation but which Congress did not in-

tend to be encompassed by the exception contained in § 2680(h). The government refers us, however, to the *National M'f'g. Co.* case, *supra*, in which the Eighth Circuit held that the failure of government employees to warn of a coming flood, was conduct that came within the misrepresentation exception. But the heavy reliance of the government on that case is misplaced in view of the Supreme Court's subsequent opinion in *United States* v. *Neustadt, supra.*

Neustadt, involved an inaccurate building appraisal by the Federal Housing Administration (FHA) which was reported to and relied on by the plaintiff, a home buyer. The appraisal was made to determine the availability of FHA mortgage insurance. While the Court held that an action against the government was barred by the misrepresentation exception, the opinion carefully limited the holding:

> Our conclusion neither conflicts with nor impairs the authority of Indian Towing Co. v. United States, 350 U. S. 61, which held cognizable a Torts Act claim for property damages suffered when a vessel ran aground as a result of the Coast Guard's allegedly negligent failure to maintain the beacon lamp in a lighthouse. Such a claim does not "arise out of * * * misrepresentation," any more than does one based upon a motor vehicle operator's negligence in giving a misleading turn signal. As Dean Prosser has observed, many familiar forms of negligent conduct may be said to involve an element of "misrepresentation," in the generic sense of that word, but "[s]o far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit," and has been confined "very largely to the invasion of interests of a financial or commercial character, in the course of business dealings." 366 U. S. at 711, n. 26.

The *Neustadt* case involved business dealings of a financial or commercial character with the government, a totally different setting from the instant action. The *Indian Towing* case, on the other hand, bears close resemblance to the present controversy. The Coast Guard's negligent failure to maintain the beacon lamp in the lighthouse is closely akin to the controller's failure to provide up-to-date weather conditions. Both cases thus involved a negligent failure on the part of government employees to perform a duty they had undertaken—to provide information and warnings to travelers of the waterways in one case and airways in the other. And in both cases, the breach of this duty resulted in injuries and deaths. Where the gravamen of the complaint is the negligent performance of operational tasks, rather than misrepresentation, the government may not rely upon § 2680(h) to absolve itself of liability. See *Eastern Air Lines* v. *Union Trust Co.*, *supra*; *United States* v. *Weiner*, 335 F. 2d 379, 398 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964).

INDEMNITY

The final issue remaining for our consideration is whether either defendant is entitled to indemnity from the other.[12] Since we have concluded that both defendants were negligent, and that the conduct of each was a proximate and concurrent cause of the accident, it is clear that both Eastern and the government may be held liable for the full amount of the damages.[13] *Prosser*, *supra* at 265. It is true, however,

[12] We are discussing the right to indemnity—the shifting of the entire loss from one tortfeasor to another—rather than the right to contribution, which is the distribution of the loss proportionately among the tortfeasors.

[13] Of course, plaintiff-appellee is not entitled to a double recovery of the amount of the judgment.

that under certain circumstances a right of indemnity will arise by operation of law to prevent what would otherwise be an unjust or unbalanced result.

Various formulas have been offered for deciding when this doctrine will come into play. Often the courts of New York have spoken in terms of allowing the "passive" tortfeasor to recover from the "active" one, *McFall* v. *Compagnie Maritime Belge*, 304 N.Y. 314 (1952). "Active" negligence, it is recognized, may consist of either an act of omission or commission. *Jackson* v. *Associated Dry Goods Corp.*, 13 N.Y. 2d 112 (1963). Some courts have stated that the doctrine will be triggered when the "faults differ greatly in gravity," *Slattery* v. *Marra Bros.*, 186 F. 2d 134, 138 (2d Cir. 1951), and that the crucial determinant is the "factual disparity between the delinquency" of the defendants. *McFall* v. *Compagnie Maritime Belge*, *supra* at 330.

Under none of these proposed formulas, however, are we able to conclude that either defendant is deserving of indemnity from the other. We view the government's negligence in failing to provide "necessary" whether information to the crew as being negligence of a continuing nature, which set in motion a chain of events that eventually ended in a crash and the death of 25 individuals. Eastern, on the other hand, was also an active tortfeasor. As a common carrier, it owed the highest degree of care for the safety of its passengers. And, as we have indicated at some length, the crew negligently approached the runway and they carelessly performed a missed approach.

In sum, we perceive no "factual disparity between the delinquency" of the defendants which would lead us to conclude that an unjust or unbalanced judgment would result if the tortfeasors are held to have been *in pari delicto* and are not allowed indemnity.

CONCLUSION

Having fully reviewed the record in this case, we recognize that we shall never know with absolute certainty why the crew of EAL 512 was careless in its approach and unable to execute properly a missed approach. This inability to explain the precise cause of an airplane crash is not a rarity in cases where the members of the crew—who would have been most familiar with the tragic events—have perished. In such instances, the court is required to reconstruct the events leading to the crash from the available evidence (often the silent charred wreckage) and from the reasonable inferences to be drawn from such evidence. We do not blink at the obvious when we say that conclusions thus grounded can never be proven with mathematical exactitude.

The fact remains, however, that the airline was entrusted with the lives of its passengers and was responsible for their safety. A tragic accident occurred which, on the evidence before us, could have been avoided if both tortfeasors had performed as reasonably required. The sad ending was that 25 persons lost their lives in the fiery aftermath. In summary, we find that the record clearly supports Judge Abruzzo's findings that Eastern's airplane lost alignment with the runway, but nevertheless continued its landing approach; that, when the crew finally did attempt a missed approach, they either failed to follow the instructions which Eastern had promulgated, or carried them out improperly. It is also clear in this case that the government, by neglecting to inform the crew that the tower visibility had dropped, in the manner we have already indicated, violated § 265.2 of the FAA's Air Traffic Control Procedures Manual, because "weather conditions, and subsequent changes, as necessary" were not re-

ported to the approaching plane. Moreover, we hold that the negligence of both tortfeasors in causing the accident was concurrent, that they were *in pari delicto* and thus neither was entitled to indemnity.

We have carefully reviewed all of the parties' contentions, and, find no reason to upset Judge Abruzzo's judgment.

Affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND OPINION

United States District Court for the Eastern District of New York

63-C-412

May 26, 1966

GRACE A. INGHAM, AS EXECUTRIX OF THE ESTATE OF PAUL B. INGHAM, DECEASED, PLAINTIFF

v.

EASTERN AIR LINES, DEFENDANT

GRACE A. INGHAM, AS EXECUTRIX OF THE ESTATE OF PAUL B. INGHAM, DECEASED, ET AL.

v.

UNITED STATES OF AMERICA, DEFENDANT

ABRUZZO, *D. J.*: This action was instituted by the Executrix of the Estate of Paul B. Ingham, deceased, to recover damages for his wrongful death on November 30, 1962, while a passenger on Eastern Air Lines, Flight 512, and which crashed while attempting to land on Runway 4 Right at Idlewild International Airport, New York, at approximately 9:45 P.M. Plaintiff also seeks to recover damages for conscious pain and suffering.

The plaintiff brought separate actions against

Eastern Air Lines by virtue of diversity of citizenship, plaintiff being a resident of Connecticut and defendant Eastern a Delaware corporation having its principal place of business in Florida (28 U.S.C. 1332), and against the United States of America under the Federal Tort Claims Act (28 U.S.C. 1346 (b)). Each defendant cross-claimed against the other for idemnification.

Plaintiff and Eastern Air Lines agreed to waive a jury, and all issues of liability were consolidated for trial and tried to the Court without a jury.

The deceased, a fare-paying passenger aboard Flight 512, was one of 25 persons who died as a result of the crash. Some 28 or 30 other passengers were injured. A few of these cases have been settled; the others are still pending.

Eastern Air Lines, Flight 512 (hereinafter referred to as EAL 512), a DC–7B aircraft and a regularly scheduled passenger flight, had departed from Charlotte, North Carolina, for Idlewild International Airport, New York. There were 45 fare-paying passengers and a crew aboard. The plane crashed to the left of, and adjacent to, Runway 4 Right at Idlewild while attempting to land. At that time there was a swirling ground fog which imparied the clear visibility of the runway itself. The plane initially contacted the ground to the left of the runway's center line and 3,460 feet from the threshold of the runway. The main portion of the plane came to a stop 610 feet to the left of the runway center line and 4,360 feet from its threshold, approximately half-way down the runway's 8,400-foot length.

For the purpose of brevity, the defendant, Eastern Air Lines, Inc., will be referred to hereinafter as Eastern and the defendant, United States of America, will be referred to as the Government.

Evidence was adduced by the testimony of witnesses at the trial and by many depositions which were offered in evidence by the parties. Certain plaintiffs filed stipulations agreeing to be bound by the end result of the case at bar and have filed a brief. The plaintiff has charged both Eastern and the Government with negligence. Eastern and the Government have each set up defenses against the charge of negligence by the plaintiff.

It is the Court's intention to take up the claims of the respective parties in the following order: (1) the plaintiff's claim against Eastern; (2) the plaintiff's claim against the Government; and (3) the cross-claims of the Government and Eastern against each other for idemnity.

The plaintiff contends that the facts proven at the trial clearly establish the negligence of Eastern; that this was a "weather" accident and the crew of EAL 512 was fully aware of adverse weather conditions but elected to accept the approach and landing clearances from Air Traffic Control and attempted to land; that EAL 512 was negligent in the manner in which it conducted its approach; that the crew passed beyond its authorized landing minimums and continued its approach, although it was not aligned with Runway 4 Right and either did not have visual reference to the runway or at some point lost visual reference; and that instead of immediately terminating the approach, the crew continued to descend to an unnecessarily low and dangerous altitude, and when the crew did elect to discontinue the approach and endeavor a missed approach it negligently performed the missed approach procedures, causing the aircraft to crash far to the left of the runway.

Plaintiff's Exhibit 7 is an enlarged photograph of the approach. EAL 512 had been in a holding pattern

at Sandy Hook, New York, and was cleared for an instrument landing system (ILS) approach. The parties have stipulated that Runway 4 Right at Idlewild, at the time of this accident, was equipped with white high intensity approach lights, red contrast lights just prior to the threshold of the runway, a line of green threshold lights, and a series of extreme high intensity flashing strobe lights (Pltf's Ex. 10). The strobe lights consist of 28 flashing bluish-white lights, each of 10,000 candlepower, placed at the same 100-foot intervals as the high intensity approach lights, with one light at a time flashing in sequence twice each second, thereby producing the effect of a single light moving a total distance of 2800 feet toward the runway threshold. EAL 512 was supposed to land on Runway 4 Right beyond the threshold and after passing these lights. Platintiff claims that it was the duty of the pilot in charge of the landing to be directly above the center of this runway, which is approximately 200 feet wide, before attempting to set his plane down on the ground.

When EAL 512 was cleared for an ILS approach, the approach controller by radar guided the aircraft to intercept a localizer beam at a point outside the outer marker. Once the aircraft intercepts the localizer beam of the ILS system, the navigation from that point on is the sole responsibility of the crew of the plane, however, the controller continues to monitor the progress of the flight to effect separation between that flight and all other known instrument flight rules (IFR) traffic. The outer marker is 2.7 nautical miles prior to the threshold of Runway 4 Right and, as the aircraft passes over this marker on the localizer beam, a visual display is depicted on a radio system in the cockpit and an audible signal occur simultaneously in the cockpit. A similar display and audi-

ble signal again occur when the aircraft is at the middle marker which is six-tenths of a nautical mile from the end of the runway. When this display and signal occur at the outer marker the crew knows they are 2.7 nautical miles from the threshold; that the aircraft is on an extended center line of the runway, and that the plane must be at a 747-foot altitude. Upon passing the middle marker the plane is at an altitude of 209 feet (Pltf's Ex. 10, pp. 2, 4). Upon passing the middle marker the pilot must direct his full attention to visual references outside the cockpit. Then he must decide that his aircraft is in a proper position to land; otherwise, he must execute a pullup called a missed approach (Tr. 189).

Surviving witnesses testified that they felt power being applied seconds before impact with the ground (Pltf's Ex. 12, p. 8135), but the aircraft did not respond nor did it gain altitude as it should have.

The minimums applicable to EAL 512 were a 200-foot ceiling and one-half mile visibility. This means that he cannot descend below 200 feet above the runway, unless at the time he was one-half mile from the end of the runway and 200 feet above the runway, and the runway was clearly visible.

The practical effect of these minimums means that the crew of EAL 512 upon passing the middle marker must have been able to see the threshold of Runway 4 Right or else execute a missed approach.

Captain Robert S. Kraskey, Eastern's Manager of Flying, called by the plaintiff, testified that a DC–7B aircraft is fully capable of executing a missed approach, even below minimums and after passage of the middle marker and flown properly, at any altitude down to 25 feet (Tr. 259). Eastern's counsel conceded that it was possible to make a missed approach from 50 feet (Tr. 630).

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Plaintiff's Exhibit 3, Eastern's Flight Operations Manual, states in unequivocal terms what procedures shall be allowed upon passage of the middle marker (Sec. 3–9, p. 4):

> It shall be the responsibility of the captain to determine and calculate when a missed approach pull-up will be made, depending on his approach airspeed and distance from the facility to the airport involved.
>
> The point at which an ILS approach will be discontinued and the missed approach pull-up started will be at the time of checking over the Middle Marker * * *
>
> * * * * * *
>
> A missed approach will be executed when visual contact has not been established when minimums have been reached or at any time visual contact is lost after descent has been made to minimums or below.

In order to assure that its crews properly execute the missed approach procedure in a DC–7B aircraft, Eastern had provided a written procedure to be followed by its crews (Pltf's Ex. 2, Sec. 2–7, p. 6):

> GO-AROUND PROCEDURE WITH FOUR ENGINES OPERATING is recommended as follows:
>
> 1. Captain applies or calls for power as required usually METO.
>
> NOTE: At airspeeds expected at the start of a go-round, the use of T.O. RPM and power not normally needed. If go-round from balked landing is made with full flaps and gear down and speed reduced to approximately minimum landing, T.O. power and RPM may be necessary.
>
> 2. Wing flaps—TAKE-OFF position.
>
> 3. Landing Gear—UP.

4. Normal Climb Power after landing gear is Up.

5. Wing flaps may be left at Take-Off position or retracted at Captain's discretion.

METO means maximium power except take-off, T.O. means take-off, and RPM means revolutions per minute.

Captain Kraskey fully explained what Eastern required of its pilots in executing a missed approach. The pilot must first apply the power needed, point the nose of the aircraft skyward, and then after the airplane accelerates to the desired airspeed, the flaps would be retracted to the 20-degree position and only after a climb attitude was established the landing gear should be retracted (Tr. 195). He stated that a missed approach usually required METO power and it might even require take-off power (Tr. 197). Usually the man flying the airplane will advance the throttles and call for METO power. The pilot engineer then advances the master lever for the propellers until he has an indication on the tachometers of 2600 RPM (Tr. 198). Simultaneous with the application of power, the man flying the airplane raises the nose of the aircraft so as to stop the airplane from descending any farther (Tr. 199), and only after a positive rate of climb has been established would it be permissible for the gear and the flaps to be retracted. Captain Kraskey stated very emphatically that the gear and flaps should never be retracted prior to establishment of a positive rate of climb and before the pitch attitude of the aircraft had been properly adjusted (Tr. 222). If the flaps are retracted before the power was applied and before the aircraft was established in a climb attitude, the effect would be for the airplane to settle into the ground or sink at a faster rate (Tr. 200).

METO power is, according to Eastern's Manual, 47.5 inches of manifold pressure, 2600 RPM, and 2600 brake horsepower. Eastern has admitted (Tr. 213-14) that at the time of initial impact of EAL 512 (1) the landing gear handle in the cockpit was in the gear up position; (2) the landing gear was in the fully retracted position; (3) the wing flaps were in the 20-degree position; (4) the aircraft's four engines were producing power at the following RPM settings:

Engine No. 1—2474
Engine No. 2—2445
Engine No. 3—2453
Engine No. 4—2422

and (5) the aircraft's four engines were developing horsepower as follows:

Engine No. 1—2290
Engine No. 2—2170
Engine No. 3—1990
Engine No. 4—2135

Captain Kraskey considered this information, as read to him from Eastern's Admissions, and stated that the engine RPM and power settings did not meet the criteria for either METO or take-off power (Tr. 214; Pltf's Ex. 2, Sec. 5–1, p. 10). He stated that the power being developed at impact was less than the power required by Eastern's Manual for a missed approach (Tr. 215); and the RPM being developed by each of the engines was less than that required for a climb configuration, (Tr. 220). The power and RPM being utilized by the aircraft at the time it crashed were much less than that available for use and considerably below the settings recommended by Eastern. (Each engine produces 3250 horsepower at take-off setting (Pltf's Ex. 2, Sec. 5–1, p. 10; Tr. 2485).)

Summarizing Captain Kraskey's testimony, the crew was required to comply with the standards set forth in the applicable Civil Air Regulations and with the operations instructions issued by Eastern (Tr. 113–115). The violation of these safety rules is some evidence of negligence. *Citrola* v. *Eastern Air Lines*, 265 F.2d 815 (C.A. 2d, 1959); *Danbois* v. *New York Central Railroad Co.*, 12 N.Y.2d 234 (1963).

Plaintiff contends that when the aircraft reached the middle marker, six-tenths of a mile prior to the runway threshold, it was required to be both aligned with the runway and to have adequate visual reference to the runway of intended landing. If both of these conditions were not satisfied and either visual reference or alignment was lacking, a missed approach was in order. The missed approach failed because there was either lack of visual reference or alignment.

The crew was alerted to the adverse weather conditions through Eastern's radios, through the Federal Aviation Agency and, in particular, through the Air Traffic Control Service operating on a number of radio communications, radar and electronic facilities for the safe, orderly and expeditious flow of air traffic. These facilities included the New York Air Route Traffic Control Center and the Idlewild Tower which contains both the Idlewild approach control and Idlewild Local Control. In addition, the Government through its Weather Bureau operated and controlled various weather observations and advisory facilities located at Idlewild. Weather conditions were relayed by the Government to the crew of Eastern and by Eastern to its crews. There is some dispute as to whether the weather conditions were below minimum or not, but that particular point will be

resolved in the Eastern defense against the Government.

In the instant action we are dealing with a fare-paying passenger and this Court is cognizant of the fact that the pilot of EAL 512 owed a duty of safe conduct to his passenger, using such care and caution required under conditions existing before and at the time of the attempted landing.

EAL 512 was in constant radio contact with Eastern company radios from the time it departed from Charlotte, North Carolina, until the time it crashed at Idlewild. At the same time, EAL 512 was also in contact with the Air Route Traffic Control Center (ARTCC) operated by the Federal Aviation Agency. At 8:22 P.M., the Eastern dispatcher advised EAL 512 that it might have to divert to Philadelphia. EAL 512 answered that they had 45 passengers on board for New York. However, the dispatcher at Idlewild, responding through Eastern Air Lines radio at Washington, sent a message, "Due to several other flights diverting to Newark, New Jersey, prefer to put you into Philadelphia." (Pltf's Ex. 25, p. 3.) EAL 512 seemed intent upon landing in the New York area and did not wish to proceed to Philadelphia unless required to do so by the Weather Bureau at Idlewild. At 8:45 P.M., EAL 512 entered the New York area, ARTCC informed it of a "pretty bad fog on the airport," and it was advised, "delay."

At 8:48 P.M., EAL 512 was advised by ARTCC that a DC-6 and an Electra missed an approach. Shortly after 8:57 P.M. it was advised that other aircraft "are attempting approaches." It was also advised that the runway visual range (RVR) was inoperative.

ARTCC transmitted the following, "Roger, Idlewild is making approaches uh is uh different type of

uh aircraft, some are making it and some are not."

At 9:40:29 P.M., less than five minutes before EAL 512 crashed, a United Air Lines aircraft, UAL 950, on the same frequency as EAL 512, reported, "we had visibility of about 50 or 60 feet." This was after UAL 950 left the airport but nevertheless describes reduced visibility on the airport.

Notwithstanding this, the proof indicates that some nine planes within a twenty-minute period, or approximately a twenty-minute period, landed safely on this runway. An Eastern plane landed safely on this runway one minute and a half before EAL 512 attempted its landing.

Surviving passengers testified that they were informed over the aircraft's intercom that New York was in a fog below limits and that the plane might have to divert to Philadelphia. The two stewardesses testified that they were personally informed of a possible diversion to Philadelphia because the New York weather was bad.

Five survivors of the crash testified by deposition. Four of these survivors saw the runway and its running lights. Frank Kolarek was able to describe in great detail the things which he could see during the approach and crash of EAL 512. Mr. Kolarek stated that he had flown on commercial flights over 100 times and that he was a motion picture cameraman by profession and was trained to observe details. He was a pilot himself and owned his own airplane at the time this accident occurred. He described the flight from Charlotte, North Carolina, to the New York area as being routine and that he was seated next to a window in the rear of the aircraft, identified as seat 15A on Plaintiff's Exhibit 8. Plaintiff's Exhibit 13 was identified by Mr. Kolarek as a drawing which accurately depicted Runway 4 Right and

the associated markings thereon as he saw them at the time of the crash. Mr. Kolarek stated that the arrow drawn from the bottom righthand corner of Plaintiff's Exhibit 13 and running towards the top left of the page represented the flight path of EAL 512 which shows the airplane crossing the runway at an angle to the left. He saw the landing gear go down and he even saw the tires on the landing gear. He also observed the flaps extended twice; the second time extended much more than the first time when the airplane was very close to the runway. While the plane was on approach, he saw white lights and he described those as being rows of lights like bars. He also observed red lights, just prior to the threshold of the runway; immediately after he saw the red lights, he saw the runway itself. The white lights which he observed prior to the time he saw the red lights were bars of white lights and were off to the left of the aircraft as he was looking down. The red lights were much closer to the aircraft and it seemed to him that the aircraft flew right over the red lights. He stated that the airplane passed over the red lights at an angle; that the airplane crossed the lights going to the left and at that time he saw the painted white lines on the runway itself. He stated that he observed these painted white lines below the aircraft at the moment the aircraft flew across the runway. The airplane was not aligned with the white lines and he estimated the airplane was proceeding 20 degrees to the left of the white lines. He even saw the pavement of the runway as the aircraft passed over it, and after the airplane crossed over the runway, he saw blue lights. These blue lights were to the left of the place where he had seen the white lights. After the aircraft passed over the runway at an angle, there was marshland or

regular land, then he saw the blue lights and the taxiway with a "fat yellow centerline," then another line of blue lights. He remembered that he could even see the pavement of the taxiway. After the airplane had crashed and he was on the ground out of the airplane, he could see the runway lights off to his left. (Pltf's Ex. pp. 8107–39.)

A second passenger, Robert L. Starski, who also survived the crash, estimated that he had flown in commercial planes probably 200 times prior to this accident. On this flight he was seated in the last seat on the righthand side of the airplane next to the window, being seat No. 17D as shown on Plaintiff's Exhibit 8. As the airplane passed over Rockaway Peninsula, the aircraft was already in the fog. He could see the glow of the rotating beacon reflected by the fog. He observed a string of green lights which he described as threshold lights and the runway lights themselves. The runway lights were perpendicular to the green threshold lights and were more or less headed in the same direction as the airplane was moving. When he saw the green threshold lights, he also observed that they were in fog, which was more or less about the same density as the fog he had observed when the aircraft was over Rockaway Peninsula. He described the approach from Sandy Hook until impact as smooth; there was no turbulence. (EAL Ex. T, pp. 8206–8222.)

Robert E. Brown, also a surviving passenger, testified that he had flown some three or four times weekly for some considerable time prior to the accident. He occupied seat No. 14C, as shown on Plaintiff's Exhibit 8, and was looking out of the window on the righthand side of the aircraft. He saw rows of blue lights to the right of the aircraft. He esti-

mated the altitude of the aircraft at this time beween 25 and 50 feet. (EAL Ex. U, pp. 8345–8360.)

One of the surviving stewardesses, Helen Mathys, who testified by deposition, stated that she was sitting in the back of the plane on the right side in the seat designated D on Plaintiff's Exhibit 8. Immediately prior to the crash, she looked out the window on the righthand side of the aircraft and saw several white runway lights. The lights she saw were not flashing but were steady, and she observed these runway lights through the fog condition. At that time she heard the engine thrust. This thrust indicated that the pilot was attempting a missed approach. (Pltf's Ex. 5 pp. 5012–69.)

The other stewardess, Patricia Richards, testified that she was looking out on the left side of the plane in the back and could see no lights and that the approach seemed normal; that she did not feel any turbulence or turns nor hear any unusual noises. (Pltf's Ex. 11, pp. 5078–79).

Section 40.351 of the Civil Air Regulations of the Civil Aeronautics Board provides (Pltf's Ex. 1):

> § 40.351 *Operational Control.* The air carrier shall be responsible for operational control.
>
> (c) *Responsibility of pilot in command.* The pilot in command shall during flight time be in command of the airplane and crew and shall be responsible for the safety of the passengers, crew members, cargo, and airplane.

At the conclusion of the trial, the Court announced that it was going to find the defendant, Eastern Air Lines, guilty of carelessness and negligence to this plaintiff. This determination is inescapable.

As a defense against this plaintiff, EAL contends that the accident was caused by a bird striking the

plane at a critical point in the approach. Eastern admitted on the opening that it could not prove that a dead bird which was found the day after the accident had struck the plane. It asked the Court to infer, in the face of overwhelming evidence to the contrary, that a bird strike did occur and that it either distracted the crew or caused some critical instruments to malfunction. Dr. Karnitschnig, a member of the Armed Forces Institute of Pathology, a qualified pathologist and a specialist in forensic medicine, examined the remains of the dead bird and concluded that it had died three or four days before the accident (Pltf's Ex. 57, pp. 7862–68).

On the afternoon following the accident, an Eastern employee searching the area found the carcass of a bird at a place before the threshold of Runway 4 Right would be reached by a plane landing on that runway (EAL Ex. Y, pp. 8461–2) belonging to a species known as the "great black backed gull" (EAL Ex. CC, pp. 7714–5). It weighed between three and five pounds, had a wing span of 65 inches and was 16 to 20 inches long (Pltf's Ex. 57, p. 7862). EAL 512 weighed 96,000 pounds, had a wing span of 117 feet, 7 inches, and a length of 108 feet, 6 inches (Pltf's Ex. 10, par. 2 and 9).

There was no physical evidence to corroborate a bird strike theory. No foreign matter, metal or paint fragments were found on the bird. The investigators were not able to find any blood, feathers or bird remains on the aircraft wreckage. All parts of the bird were found on the ground.

The location of the carcass further demonstrates that any strike would have had to take place so far back in time as to be remote. The nearest piece of the carcass was found 300 feet prior to the threshold. Therefore, if any contact had occurred it must have

taken place even further back in the approach. Since the initial contact with the ground was 3,460 past the threshold, the alleged bird strike took place more than 3,760 feet prior to the point of initial impact.

There is a complete lack of evidentiary proof that the bird did strike any part of the plane. This is best illustrated by the following from Eastern's post trial brief (p. 45):

> There is no proof in this record that it did not hit this aircraft. * * *

The converse is also true. There is no proof that the bird did hit the aircraft. Eastern had the burden of proof and did not sustain this burden.

The Government disclaims liability and claims (1) that all pertinent weather information was made available to the crew of EAL 512; (2) that the weather conditions existing at the time of the crash were above landing minimums; (3) that EAL 512 failed to comply with Eastern's rules and regulations in making its approach; (4) that the runway visual range was malfunctioning at the time of the crash; (5) that Eastern had the whole responsibility for the safe operation of EAL 512; and (6) that plaintiff's claim falls within the statutory exceptions to the Government's waiver of sovereign immunity for tort claims.

One of the theories set forth by the plaintiff concerning the negligence of the Government is that the government employees were negligent in declaring the Runway 4 Right Visual Range (RVR) inoperative when it was actually functioning and displaying values below EAL 512's authorized landing minimums, in failing to restore the RVR to service and in failing to report the RVR values to EAL 512.

The RVR is an electronic instrument developed by the Weather Bureau to measure horizontal visibility

in the area adjacent to the threshold of the runway. The RVR is designed to measure the visibility a human observer would see if he was standing in the same areas as the RVR and taking observations every minute. RVR, in contrast to the prevailing or runway visibility, is based on what a pilot in a moving aircraft will see. The RVR produces a new value each minute which is then displayed in the Weather Bureau office, the Tower Cab and the radar room. When the RVR is operating, the RVR values, rather than either the Tower or Weather Bureau visibility, controls aircraft.

Eastern's Flight Navigation Manual (P!tf's Ex. 4, par. 28–2) specifically states that the authorized landing minimum for an airplane similar to that of EAL 512 is 2,000 feet. Captain Kraskey testified that when pilots received a report of any RVR value of less than 2,000 feet before commencing their approach, they would not be permitted to commence an approach regardless of any other information which might be received (Tr. 278–79). Captain Kraskey also testified that if they received such RVR report after having started the approach, but before reaching the outer marker, they would immediately discontinue the approach and execute a missed approach (Tr. 298–99).

Before setting forth its reasons for either sustaining or rejecting plaintiff's theories, this Court must briefly explain how the RVR system functions.

At a point approximately 500 feet to the right of the center line of Runway 4 Right and 500 to 1,000 feet from the threshold are two components of the RVR known as the projector and detector. These instruments measure the transmissivity—transmissivity means the ability of the air to transmit light—of the atmosphere sampled between the projector and detec-

tor and transmits that information out to the Weather Bureau office where the information is computerized and transmitted to computer read-outs in the Tower, the IFR Room and the equipment room in the Tower. The computer read-outs are intended for use by the controllers so that they can look at the read-out display and know immediately the RVR reading for Runway 4 Right at any given time. These RVR readings would then be transmitted to pilots who intended to use Runway 4 Right. These read-outs used by the Tower Cab and IFR Room, as well as the read-out in the equipment room, are equipped with a special "transmission error" detection device which would warn the user of the equipment of transmission error. Such a warning manifests itself on the equipment as "red balls," or red overlights superimposed on the digital values appearing in the computer windows.

Government's Exhibit A, Multiple Address Letter No. 38-61, provides in pertinent part as follows:

> 4.3 *Determination of Valid Display Values.* The design of the RVR data transmission system should ensure a very high level of accuracy in values transmitted to the FAA displays from the Weather Bureau office. However, it is possible that errors will occur at very infrequent intervals. The RVR system uses a parity check for the detection of errors in the transmission of RVR values from the signal data converter to the receiver-decoder. This check will readily identify MOST erroneous RVR values by circular colored areas superimposed on the digital display in the first and second digits. Such values are not to be used. The absence of circular colored areas does not, however, guarantee the validity of a reading. If there is any reason to believe that displayed values are erroneous take action as required in Par 6.0 and 6.1.
>
> * * * * *

At approximately 8:35 P.M. on the night of the crash, William Keepers, the Watch Supervisor, observed a "red ball" on the 4 Right RVR display in the IFR Room. Both he and Herbert Spiselman, a senior FAA controller, watched the RVR for two or three minutes. He was able to observe RVR values with the red balls visible but was unable to recall the values displayed. Mr. Keepers then called Thomas Foster, the Cab Coordinator, and was told that a "red ball" was also appearing on the Tower Visual Display Unit (VDU). Mr. Keepers then told Mr. Spiselman to tell the Weather Bureau that " * * * we had these red balls on the equipment" and ask the observer "* * * to check the equipment" (Tr. 1102) and to determine if the equipment was out of service or malfunctioning. Bradley, the Weather Bureau observer, had the responsibility for determining if the RVR was to be declared "inoperative" or continued in service (Tr. 1829).

Plaintiff's Exhibit 39, Part 400, p. 4-15, par. 481.1, Facility Operation Manual, reads as follows:

> 481.1 The U. S. Weather Bureau is responsible for checking and determining the operational status of the Runway Visual Range meter indicators and/or digital readouts as prescribed in Circular N, paragraph 2750. Facility personnel shall cooperate with local Weather Bureau personnel performing meter and/or digital readout checks and shall request checks at any time considered advisable or when any malfunctioning is suspected. The Weather Bureau Station shall be notified immediately upon determination that the RVR meter or digital readout is inoperative or when and malfunctioning is suspected; during such a condition, the RVR system shall be considered to be inoperative and Runway Visual Range shall be reported as missing.

At 8:37 P.M., when Bradley received the report of red balls from the Tower, he told the controllers in the Tower that two Weather Bureau technicians, Gill and Pursley, were on their way to the Tower and advised the controllers to use his (Bradley's) RVR values for five minutes. Bradley then walked out into the hall to see if he could locate the technicians who had just left his office. He was unable to locate them and made no further effort to contact them. At approximately 8:37 P.M., or shortly thereafter, Bradley checked his digital display read-out by converting the transmissometer recorder graph value to an RVR value and then compared such value with the RVR display. He found at such time that the two values were consistent. The RVR values as compared registered 10—which indicated a visual range of less than 1,000 feet.

Mr. Keepers, the Watch Supervisor, again called Bradley at approximately 8:44 and informed him that the IFR Room RVR was still "red-balling" and that the technicians had not arrived. Following this second call from the Tower, Bradley declared the entire RVR system "inoperative," took it out of service and reported it is "RVR NO" on the WBAN–10 A (Pltf's Ex. 49). The WBAN–10 A is a form on which a Weather observer records at regular intervals all weather observations including the RVR.

At 9:30 P.M., approximately 45 minutes after the RVR equipment was declared not available, Gill and Pursley returned to the Weather Bureau office to obtain additional tools for their work and were advised that the RVR was red-balling. Immediately thereafter, they returned to the 8th floor equipment room to make necessary repairs. On arriving at the equipment room at approximately 9:40 P.M. they found the RVR red-balling and displaying an inter-

mittent minus sign. They were able to repair the intermittent minus sign but could not eliminate the red balls (Tr. 2152). Gill and Pursley both testified that they were working on this equipment at approximately 9:45 P.M., the time of the accident; that it was red-balling throughout this period; and that at approximately 10:10 P.M. the red balls on the equipment disappeared.

The plaintiff contends that both Keepers and Bradley acted in a neglectful and unreasonable manner and violated the controlling government regulations.

Plaintiff also claims that all Keepers did was to report the appearance of red balls; that he did not determine that the Tower displays were "inoperative"; that he did not direct Spiselman to report them "inoperative" and he did not at 8:44 report the Tower VDU's to be "inoperative" (Tr. 1010–11); that although Keepers suspected a "malfunction" in the RVR, at no time did he compare the IFR and Tower Cab RVR values with each other or with the Weather Bureau observers' values; that at no time did he request that the RVR be serviced or checked (Tr. 1120) and that this was a direct violation of Sec. 481.1 of the FAA Facility Operation Manual.

The Government contends that Keepers had no discretion as to what he must do when the red balls appeared on the equipment used by him and that he was prohibited from using RVR values that appear in conjunction with the red balls (Tr. 1008–13).

This Court finds that plaintiff's claim of Keepers' negligence is unwarranted. Although there is no denying the fact that Keepers himself did not "specifically" request a read-out check by the Weather Bureau's observer of the RVR, he did, through the services of Spiselman, inform the Weather Bureau observer, Bradley, that the RVR display unit was red-

balling. Keepers' primary duty under the circumstances was to notify the Weather Bureau "immediately" of a suspected "malfunctioning" of the RVR. This he did. He was under no duty to make any tests concerning the RVR and acted in a reasonably prudent manner by refusing to use the RVR values which were displaying red balls.

Bradley's digital display read-out and the RVR display values were identical. The RVR values transmitted would have been of no help as they conformed to Bradley's display read-out. From 9:07 P.M. to 9:30 P.M. the weather advisories transmitted to EAL 512 stated that the RVR 4 Right was inoperative. The Government was not negligent in declaring the RVR inoperative. The red-balling of this unit necessitated its nonuse as red-balling was a positive indication that its values were dangerous to transmit to aircraft.

Of utmost significance in determining the Government's liability to the plaintiff's deceased is its responsibilities under the provisions of the following regulation:

Circular N, the Government's Manual of Surface Observations (Pltf's Ex. 41):

> 1.0. *Observer Responsibility—General.* Taking observations is in general, the primary duty of the observer. Unless otherwise instructed (see Par. 2.0), nothing except the most pressing demands upon the observer's attention should be given precedence to this fundamental duty. Since life, property, and the convenience of travelers, as well as accurate forecasts, may depend upon his observations, the observer should make every effort to take the observations as accurately and completely as possible, and to file them in sufficient time for scheduled transmission. *Every observation must be accurate in all its parts, and it must convey a complete pic-*

ture of the meteorological situation at the station. (Court's emphasis).

The Government is also under a duty to issue weather information to aircraft pursuant to the provisions of Section 265.2 of the Air Traffic Control Procedures Manual (Pltf's Ex. 38) which reads as follows:

> 265.2 At locations where official weather reports are obtained by the controller through routine procedures and the ceiling and/or visibility is reported as being at or below the highest "circling minima" established for the airport concerned, a report of current weather conditions, and subsequent changes, as necessary, shall be transmitted as follows:
>
> * * * * *
>
> B. By approach control facilities, to all aircraft at the time of the first radio contact or as soon as possible thereafter; and

The action against the Government is founded in 28 U.S.C. 1346 (b) which is what is now well known as the Federal Tort Claims Act.

The Government disclaims liability. In view of its disclaimer provisions, it is well to note the sequence of weather reports issued by the Government's Weather Bureau.

As EAL 512 approached the New York area it contacted Air Route Traffic Control Center (ARTCC) and received various weather advisories. In response to a message from EAL 512 at approximately 8:45 P.M., ARTCC advised aircraft, "* * * there is a pretty bad fog on the airport now." ARTCC also informed EAL 512 that some aircraft were missing approaches, others attempting approaches, while others were landing. At 8:57 P.M., while EAL 512 was in its holding pattern at Sandy Hook, it was advised, "* * * delay indefinite due to weather." At 9:15 P.M.,

ARTCC advised, "* * * some are making it and some are not * * *," and again, at 9:20 P.M., "* * * some aircraft are making an approach successfully and others have not." At 9:23 P.M., EAL 512 was advised to contact Idlewild approach and came under the control of Richard Ketterman, at the AR–1 position. At 9:30 P.M., Ketterman's advisory to the crew of EAL 512 was visibility one mile. At 9:32:49 P.M., Joseph H. Kelley, the Air Traffic Control specialist coordinator, was receiving and disseminating weather reports to the ARTCC controllers in the IFR Room. Kelley received a report from the Tower Cab coordinator that the visibility had gone from one mile to three-quarters of a mile and, facing the controllers and in a louder than normal voice (Tr. 1283), announced this diminished visibility to the approach radar section.

Notwithstanding Kelley's announcement at 9:32:49 P.M. that visibility had decreased to three-quarters of a mile, at 9:33:57 Ketterman advised EAL 512 that visibility was still one mile. This was the last message that was sent by any government employee in the Weather Bureau or in the control tower to the crew of EAL 512. The crash occurred at 9:45 P.M. During this period of approximately 12 minutes, the crew of EAL 512 was not apprised of any weather conditions or change in weather conditions. During this period of time, the WBAN indicated to Bradley, the meteorologist, that the weather conditions at Runway 4 Right were deteriorating and visibility diminishing. It was the duty of the Government employees to relay to EAL 512 the information that the weather was deteriorating and visibility was diminishing during this 12-minute period. If the crew of EAL 512 had been advised that the WBAN indicated visibility was below one-half mile during this period, it is a possibility

that the crew of EAL 512 might have maneuvered the plane differently. It would have alerted the crew to the changed weather conditions on its approach to Runway 4 Right and it is within the realm of probability that the crew would have been ready and able to make a missed approach sooner than they actually did. Had EAL 512 been apprised of the deteriorating weather and diminishing visibility, its captain might have decided to divert to Philadelphia. At any rate, this Court finds the Government negligent in not relaying the change in weather conditions to EAL 512 from 9:33 P.M. to 9:45 P.M.

The Government raises the issue that, even if the Court finds it negligent and that the plaintiff is entitled to a recovery against the Government, the plaintiff's claim is nevertheless precluded by two statutory exceptions to the Government's waiver of sovereign immunity under the Federal Tort Claims Act.

The Government cites 28 U.S.C. 2680 (a) and (h) which reads as follows:

> § 2680. *Exceptions*
>
> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, *exercising due care,* in the execution of a statute or regulation, * * *. (Court's emphasis.)
>
> * * * * * *
>
> (h) Any claim arising out of * * * misrepresentation * * *.

This objection is not well taken and is overruled. There was no misrepresentation as to the weather between 9:33 P.M. and 9:45 P.M. There was in fact an omission on the part of the Government in failing to convey any weather report to EAL 512 during this period. Subdivision (a) is distinguished because it exempts the Government from liability if the employee

of the Government was exercising due care. The Court finds from the facts that the employees of the Government in charge of disseminating weather reports were not exercising due care to the passengers on EAL 512 but were guilty of want of care.

The testimony indicates that nine planes landed within a 20 to 22-minute period prior to the crash. Some landed before 9:33 P.M., others thereafter. This is not a complete defense. The negligence of the Government must be viewed with regard to the rules and regulations imposed upon it and the failure of the controllers to relay the deteriorating weather conditions from 9:33 P.M. to 9:45 P.M.

For the reasons set forth above, the Court finds that the Government was careless and negligent and must respond in damages to the plaintiff.

The Court finds that Eastern was also careless and negligent. The crew of EAL 512 was cognizant of the weather conditions existing at Runway 4 Right and, although the Government was negligent for not disseminating weather reports to EAL 512 between 9:33 P.M. and 9:45 P.M., it does not absolve Eastern's radio at Idlewild from apprising the crew of EAL 512 as to the true weather conditions just prior to the time they were to land. Eastern's weather station was in close proximity to the Government's Weather Bureau at Idlewild and it was the responsibility of Eastern to apprise its own crew of what the weather conditions were just prior to the time of landing. Eastern's crew must also be held careless and negligent in that, whether the weather conditions were minimum or not, it should have been ready and able to execute a missed approach in conformity with the rules laid down by its own company.

The Court, therefore, finds that the accident to the plaintiff occurred because of the concurrent careless-

ness and negligence of Eastern Air Lines and the United States of America.

Eastern claims indemnity against the Government and the Government claims indemnity against Eastern. In view of the fact that this Court has held that both of these defendants were concurrently negligent, neither is entitled to indemnification from the other.

That under certain circumstances there may be a right of indemnity is unquestioned. However, where there is an affirmative duty to act and where acts of omission concur in causing damages, as in the instant case, there is no right of recovery over. The right of indemnity is also enforced in favor of one tort-feasor against another jointly liable, where degrees of culpability are unequal and the second tort-feasor, in equity and justice, should bear the burden.

A recent case involving the negligent operation of airplanes is *United Air Lines, Inc.* v. *Wiener,* 335 F.2d 379, decided June 24, 1964, by the United States Court of Appeals for the Ninth Circuit. A rehearing was denied September 11, 1964, and certiorari dismissed, 379 U.S. 951. *Wiener* explores the question of indemnity in detail and allowed indemnity to United Air Lines over as against the Government, but the facts in that case are quite different than the case at bar. A jet airplane with a student pilot flying almost blind came out of the sky and collided with a passenger United Air Lines' plane.

The Court in discussing the theory of indemnity stated (p. 398):

> In order to effect equity and justice in certain circumstances the rule has been relaxed to permit exceptions, but the cases relaxing the rule cannot be entirely harmonized or reconciled.

and (p. 399):

> These [many] cases frequently characterize

the negligence of the indemnitor as "active," "primary," or "positive" and the negligence of the indemnitee as "passive," "secondary," or "negative." Such characterizations have been criticized as being artificial, lacking objective criteria desirable for predictability in the law, and various rationales have been proposed for allowance of indemnity in such cases. Thus, indemnification of a concurrently negligent tortfeasor is said to be based upon a disparity of duties of care owed by the tortfeasors to the injured party, the doctrine of last clear chance or discovered peril, a disparity of gravity of the fault of the tortfeasors, or a combination of these.

The Court in finding that an allowance of indemnity was warranted in *Wiener, supra,* held:

United's duty to appellees' decedents was to exercise the highest degree of care; the government's duty was to exercise ordinary care. The government's negligent acts occurred literally from the start to the finish of this tragic incident. The cumulative effect of these negligent acts was to dispatch United flight 736 and the government's high-speed jet training mission, conducted by a student pilot who was virtually blindfolded and an instructor whose cockpit preoccupations were greater than ordinarily demanded of pilots flying under VFR conditions and responsibilities, into the same area without warning to those in control of either craft. If we accept the government's assertions, the government's pilots discovered United's peril in time to effectively respond but engaged in a maneuver destined to encounter rather than to evade. Contrasted with all of this is the finding that United's pilots, to some disputed degree of probability, could have seen the jet and, in discharge of the obligation to exercise the highest degree of care for their passengers, should have seen and avoided the jet. In view of the dis-

> parity of duties, the clear disparity of culpability, the likely operation of the last clear chance doctrine and all the surrounding circumstances, the findings that United and the government were in *pari delicto* are clearly erroneous and we hold that there is such difference in the contrasted character of fault as to warrant indemnity in favor of United in the nongovernment employee cases. [p. 402]

The case at bar is distinguishable from the *Wiener* case, *supra.*

In view of the fact that the Court has ruled that this accident was caused by the concurrent negligence of both Eastern and the Government, there cannot be any indemnity from one against the other.

The parties may submit any findings of fact and conclusions of law which they desire to submit, together with a decree in accordance with this opinion, within ten days.

MATTHEW T. ABRUZZO,
U.S.D.J.

NOTE.—This Court has tried to expedite this opinion due to the fact that there are 36 cases still pending as a result of this aircraft crash. If either defendant seeks a review of this decision, the appeal should be perfected for the October Term in that the Court of Appeals' determination may dispose of the 36 actions. This Court is of the opinion that if an application for a preference is made for said Term it will be granted.

Additional Findings of Fact and Conclusions of Law

United States District Court for the Eastern District of New York

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63–C–412

Grace A. Ingham, as Executrix of the Estate of Paul B. Ingham, Deceased, plaintiff

v.

Eastern Air Lines, Inc., defendant

64–C–104

Grace A. Ingham, as Executrix of the Estate of Paul B. Ingham, Deceased, and Rita Freedman, as Administratrix of the Estate of Milton Freedman, Deceased, plaintiffs

v.

United States of America, defendant

A. The Court's opinion, dated and filed May 26, 1966 constitutes the Findings of Fact and Conclusions of Law herein, supplemented by the following:

B. The Court makes the following additional Findings of Fact and Conclusions of Law:

1. The accident which is the subject matter of this action was caused by the concurrent negligence of the two defendants, Eastern Air Lines, Inc., and United States of America.

2. Defendant Eastern Air Lines, Inc., (hereinafter referred to as Eastern) was negligent in failing to properly exercise a missed approach procedure when adequate visibility and alignment with the runway was lost.

3. Defendant Eastern was negligent in continuing its approach after losing visual reference and/or alignment with Runway 4 Right.

4. In failing to immediately discontinue its approach after losing visual reference and/or alignment, defendant Eastern violated the instructions and the procedures set forth in the Eastern Flight Operations & Flight Navigation Manuals.

5. Eastern was responsible for the safety of the passengers, and in descending below its minimum authorized altitude and to an unnecessarily low and dangerous altitude it violated Civil Air Regulations 40.351(c) and its duty to its passengers.

6. When the crew of EAL 512 finally determined to execute a missed approach, the crew deviated from the required missed approach procedure established by Eastern and set forth in EAL's Flight Operations Manual.

7. The crew of EAL 512 negligently and improperly executed the missed approach procedure.

8. Continuing the approach to a low and dangerous altitude after losing visual reference and alignment was a contributing and proximate cause of the crash.

9. The crew's negligence and improper execution of the attempted missed approach was a contributing and proximate cause of the crash.

10. Between 9:33 and the time of the crash at 9:45 weather at Idlewild was deteriorating and this information was known to the air traffic controllers, employed by defendant United States of America and

Eastern Air Lines, and was, in every sense, available for commuication to EAL 512.

11. Prior to 9:36 P.M., government employees had determined that the visibility conditions at Idlewild had deteriorated.

12. Prior to 9:36, government employees at Idlewild determined:

(a) that visibility observed from the tower had deteriorated from 1 mile to ¾ of a mile;

(b) that visibility observed by the Weather Bureau Observer 35 feet above the ground had deteriorated from ½ to ¼ of a mile; and

(c) that the amount of sky obscured by fog and clouds had increased from 2/10 to 8/10 of the sky.

13. The government owed a duty to the passengers aboard EAL 512 to provide the crew with accurate, current and up-to-date weather information.

14. The government owed a duty to the passengers aboard EAL 512 to inform the crew that during the 13 minutes between 9:32 and 9:45 that the visibility and weather at Idlewild was deteriorating.

15. The government's air traffic controllers, pursuant to the Air Traffic Control Procedure Manual, had a duty to passengers aboard EAL 512 to provide the crew with "current weather conditions and subsequent changes, as necessary".

16. The air traffic controllers, employed by the United States at the Idlewild tower, who were in communication with EAL 512 knew that the visibility from the tower cab had deteriorated from one mile to three quarters of a mile. Despite this the visibility of one mile was negligently given to EAL 512.

17. The air traffic controllers, employed by the United States, who were in communication with EAL 512 knew that the tower visibility had de-

teriorated from 1 mile to ¾ of a mile, that the visibility observed by the Weather Bureau Observer had deteriorated from ½ to ¼ of a mile and that the amount of sky obscrued had increased from 2/10 to 8/10. Despite this, they negligently failed to give this information to EAL 512.

18. The Court concludes that the government employees negligently failed to provide the crew of EAL 512 with all available information concerning "current weather conditions" and with all available and necessary changes.

19. The Court concludes that during the critical 13 minutes of EAL 512's approach, the government employees negligently failed to provide the crew of EAL 512 with accurate, current and up-to-date weather information.

20. The Court concludes that during the critical 13 minutes of EAL 512's approach, the government employees negligently failed to provide the crew of EAL 512 that the weather and visibility at Idlewild was deteriorating.

21. The Court concludes that the negligent failure of the government to inform EAL 512 of the deteriorating weather and visibility at Idlewild during the critical final 13 minutes of the approach was a proximate and concurring cause of the accident.

MATTHEW T. ABRUZZO,
United States District Judge.

Dated: Brooklyn, N.Y., June 20, 1966.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 540

UNITED STATES OF AMERICA,

Petitioner,

—against—

GRACE A. INGHAM, as Executrix, of the Estate of Paul B. Ingham, deceased.

BRIEF OF RESPONDENT EASTERN AIR LINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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GRACE A. INGHAM, as Executrix, of the Estate of Paul B. Ingham, deceased.

BRIEF OF RESPONDENT EASTERN AIR LINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This action is one of a number of suits arising out of an Eastern Air Lines, Inc. accident which occurred during deteriorating weather on the night of November 30, 1962. Separate suits were commenced in the United States District Court for the Eastern District of New York by Grace A. Ingham as executrix against Eastern Air Lines, Inc. and the United States of America. Both Complaints alleged independent negligent acts of each defendant as the proximate or concurring cause of the accident. In the suit against the United States a third party complaint was filed by the United States impleading Eastern Air Lines claiming indemnity and contribution. A similar third party complaint was filed impleading the Government in the suit against Eastern Air Lines. The third party complaint against the Government was based upon common law indemnity.

At the completion of the consolidated pre-trial discovery the trial court directed a consolidated trial of the within suits. While not all plaintiffs were prepared to consider this as a "test case" most plaintiffs, at the request of the trial judge, stipulated to be bound by the outcome of the non-jury trial against Eastern Air Lines, Inc. and the United States of America.

The trial was lengthy and culminated in an Opinion and Additional Findings of Fact and Conclusions of Law holding Eastern and the Government liable to the plaintiff and dismissing both third-party complaints (1290a-1324a).* The Court of Appeals for the Second Circuit unanimously affirmed the decision below. *Ingham* v. *Eastern Air Lines, Inc.*, 373 F. 2d 227. This opinion is also found at pages 1a to 27a of the Petition.

Petitioner's present arguments in support of a Writ of Certiorari, i.e., the "misrepresentation exception", alleged compliance with FAA regulations and failure to establish proximate cause were all carefully considered by the trial court and the Court of Appeals. Both courts completely rejected the Government's contentions. We respectfully submit that this Court should make a similar disposition of the instant Petition. The Petition for a Writ of Certiorari should be denied forthwith.

---

* Unless otherwise designated page references refer to pages of the Joint Appendix.

The Facts of the Case

We do not believe that this Court should become involved in the fact issues decided below. However, since the Petitioner has portrayed a fact picture we find it necessary to make some elaboration in order to put the fact questions in their proper perspective.

The Air Traffic Control Facilities

The Government's responsibility for air traffic control is spelled out by federal statute. Section 1348 of 49 U. S. Code provides:

> "Airspace control and facilities—Use of airspace
>
> "(a) The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order *to insure the safety of aircraft* and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest." (Our emphasis).
>
> * * * *
>
> "Air traffic rules
>
> "(c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the *navigation, protection, and identification of aircraft, for the protection of persons and property* on the ground, and for the efficient utilization

> of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects." (Our emphasis).

On the night of the aceident the Government had assumed this obligation and was required to provide Air Traffic Control Service to Eastern Flight 512. This service was defined in Section 120 of the Air Traffic Control Procedures Manual (Plaintiff's Ex. 38) as:

> "A service provided for the purpose of promoting the safe, orderly and expeditious flow of air traffic, including airport, approach and en route air traffic control services."

This service was furnished by Approach Controller Ketterman who operated from the IFR Room of the tower and Local Controller Siebert whose position was in the Tower Cab (348a). Ketterman communicated with the flight by voice radio and followed it on his radar scope; Siebert also communicated by voice radio. In addition, Siebert visually observed the flight on its let-down to the runway.

The facts adduced at the trial and referred to by the trial and appellate courts clearly establish that the Government had a non-delegable duty to the traveling public and to Eastern Flight 512. It was obliged to furnish this flight with accurate, up-to-date and complete reports of the existing weather and subsequent changes as necessary (Plaintiff's Exs. 38, 40, 41 and 46). In finding against the Government both the trial court and the unanimous Court of Appeals specifically referred to the controller's mandatory obligation set

forth in Section 265.2 of the Air Traffie Procedures Manual (Plaintiff's Ex. 38) which provided:

> "265.2 At locations where official weather reports are obtained by the controller through routine procedures and the ceiling and/or visibility is reported as being at or below the highest 'circling minima' established for the airport concerned, a report of *current weather conditions, and subsequent changes,* as necessary, shall be transmitted as follows:
>
> A. By centers, as part of the approach clearance, to all aircraft to which the approach clearance is delivered directly to the pilot by the center controller;
>
> B. *By approach control facilities, to all aircraft at the time of the first radio contact or as soon as possible thereafter;* * * *" (Our emphasis.)

This regulation was binding on both Ketterman and Siebert.

Ketterman first came in contact with the flight at 9:24:15 P. M. The flight was given the weather as:

> ". . . Wind calm. The Idlewild weather, sky partially obscured, *visibility one and one-half miles with fog.* * * *" (Plaintiff's Ex. 16, page 39, our emphasis).

Approximately six (6) minutes later at 9:30:26 P. M. he broadcast weather to all aircraft as:

> ". . . Idlewild weather, sky partially obscured, visibility . . . *one mile with ground fog . . .*" (Plaintiff's Ex. 16, page 46, our emphasis).

Three minutes later, at 9:33:57 P. M., he repeated the same weather to all aircraft.

Prior to this time the weather had deteriorated considerably. At 9:32:42 P. M. Controller Speiselman, who was sitting next to Ketterman broadcast visibility as three-quarters mile (Plaintiff's Ex. 19, page 2). At 9:32:49 P. M. Controller Nelson gave the same critical, 25% reduction in visibility to the aircraft he was controlling (Plaintiff's Ex. 18, page 12). Admittedly it was Ketterman's job to give the latest available weather information (583a) yet he never gave this critical change to Eastern 512. Nor did Ketterman give the flight the other *subsequent changes,* i.e., surface visibility reduction to one-quarter mile and fog coverage increase to eight-tenths, all of which indicated a further deterioration of the weather below landing minimums. Thus, when Flight 512 commenced its final ILS approach it was totally ignorant of the true weather conditions. Siebert compounded Ketterman's error by a similar neglect in failing to report the existing weather to the flight.

Activity in the Tower Cab centered around Local Controller Siebert. He handled Flight 512 on its final approach to the runway. Flight 512 checked in on the Local Control Frequency at approximately 9:40. The crash occurred at approximately 9:45. During this five minute period Siebert neither advised the flight of the actual weather conditions as reported by the Weather Bureau nor did he advise the flight of the fog conditions being experienced by the other aircraft reporting to him.

Below we also referred to the negligent handling of the Government's weather detecting equipment

known as the Runway Visual Range System. We also referred to the violation of Government regulations governing visibility observations. However, since neither is necessary for the court's consideration of the current Petition they will not be outlined here.

The Approach of Eastern Flight 512

Flight 512 was in command of Captain Ed Bechtold. Like his crew he was highly qualified and well trained in the operation of the DC-7 (204a). Prior to his untimely death Captain Bechtold had been a crusader for air safety. He headed the Air Line Pilots Association (ALPA) accident investigating team and served as a Region Safety Chairman (945a-950a).

During initial and recurrent training as well as on check flights the members of this crew were drilled and checked in the missed-approach or go-around procedure (159a, 168a). Generally speaking the aircraft commander was required to execute a missed approach if *at any time* after passing the middle marker on his approach—a point approximately a half mile from the threshold of the runway—he lost sight of the runway (119a). Thus the need to know actual weather conditions increases as the visibility decreases (635a). Eastern's regulations and those of the Government required the execution of the missed approach *no matter how low the aircraft had descended in its landing configuration* (129a). The Captain had no choice. If he couldn't see the runway he couldn't land—no matter how close he was (Plaintiff's Ex. 3, Sec. 3-9, p. 4, 623a).

Throughout this flight it was subject to Governmental control. It was prohibited from operating contrary to Air Traffic Control instructions (14 CFR 60.19). In addition to expecting positive control from the Air Route Traffic Controllers, Approach Controller and Local Controller Captain Bechtold had reason to expect that he would be kept continuously advised of *current weather* conditions at the airport and runway visibility for the runway in use (636a, 640a-642a). *This was an obligation assumed by the Government* (Plaintiff's Ex. 38, Section 265.2 and Plaintiff's Ex. 46). Consequently Captain Bechtold was entitled to rely upon the information given to him as being the most current and truly representative of the conditions which he could expect at Runway 4R—the runway to which he was directed by the Government.

After circling in a holding pattern for some time Flight 512 was released to Approach Controller Ketterman at approximately 9:24 P. M. At this time the flight was advised that Runway 4R was in use, that the sky was partially obscured and visibility was one and a half miles (Plaintiff's Ex. 16, page 39). This visibility was well within the one-half mile landing minimum for this runway. Flight 512 continued its approach. It was vectored by Ketterman who followed the flight by radar along the Instrument Landing System (ILS). At 9:30 P. M. and again at 9:34 P. M. Ketterman advised that the visibility was one mile with ground fog. Although Capt. Bechtold continued on his approach for another eleven (11) minutes the Government admits that it furnished no further advices with respect to the current visibility and runway conditions nor subsequent changes (373a-374a).

During this eleven (11) minute period substantial changes occurred which were well known to Ketterman at Approach Control and Siebert at Local Control. Both Controllers were being constantly advised that a severe ground fog condition existed on Runway 4R; that tower visibility had decreased to three-quarters of a mile (695a); that surface visibility had decreased to one-quarter mile (684a, 687a); and that fog coverage had increased from two-tenths to eight-tenths of the sky (785a, Finding 12—1306a). None of this vital information was passed on to Flight 512 although both Ketterman and Siebert were in constant radio contact with the flight (Plaintiff's Exs. 16, 18, 21, Finding 17—1307a). Rather the Government permitted the crew to be lulled into a false sense of security as to the actual runway conditions.

As the flight approached the airport and from a height and at a distance from the runway the terminal area was clearly visible. Not so in the immediate area of the runway. The insidious nature of this type of fog, dense in horizontal proportion but shallow in its vertical component, made it extremely dangerous to landing aircraft. Due to its thin vertical development, the fog presented a deceptive picture. While above the fog the passengers and crew were able to see high intensity lights on the ground without much difficulty. As the aircraft descended through the top of the fog layer, Captain Bechtold was no longer looking down through 50 feet of dense fog but was looking horizontally out into several thousand feet of dense fog. The effect was similar to pulling a curtain down before his eyes. Since Captain Bechtold had based his decision to continue his approach upon information that

the visibility at the airport had been constant at "one mile" for some fifteen (15) minutes and that neither the fog cover nor the surface visibility had changed he could not have anticipated what he found. Faced with this sudden emergency he reacted as his training demanded—he lost sight of the runway—he was required to attempt to execute a missed approach. He had to make an almost instant decision (613a).

Flight 512 had been followed on radar by Ketterman and visually by Siebert. Both agreed that its approach was *normal*. Similarly the surviving passengers who testified as well as the stewardesses agreed that the approach was *normal* almost to the point of touchdown. Siebert saw Flight 512 as it passed the middle marker six-tenths of a mile from the threshold of Runway 4R (610a). He watched 512 until its "Grimes Light faded from view as the aircraft entered the ground fog" (Plaintiff's Ex. 48, 609a). Examination of the wreckage evidenced that efforts had been made to fly out. Speed had been increased (982a) and flaps and landing gear had been adjusted (1161a, 1281a). According to Perry, an employee of the aircraft manufacturer, the aircraft had attained sufficient speed and was properly configured to make a missed approach *unless* the aircraft ran out of altitude. In fact, this is what occurred. Undisputed mathematical computations (Eastern's Ex. KK 976a-984a) conclusively established that once Flight 512 was lured into this fifty foot thick ground fog the accident became inevitable. The crew no longer had the time nor the altitude to recognize the situation and successfully execute a missed approach.

POINT I

The Government's contentions with respect to the "misrepresentation exclusion" are sham. They are designed to draw this Court into a review of questions of fact.

The Government's defense of the "misrepresentation exclusion" of the Federal Tort Claims Act was characterized by the Court of Appeals as a "second line of defense". Indeed, it was such a remotely considered defense that it was never pleaded nor was it argued during the course of the trial. It first appeared in the post-trial brief. As far as we know it has never been raised before or since in an aircraft accident where actions of FAA Control Tower operators are at issue and where the gravamen of the complaint is negligent performance of operational tasks.

Perhaps the best answer to the Government's position on this exception is found in the unanimous opinion of the Second Circuit. Writing for the Court, Judge Kaufman said:

> "Nevertheless, the Government's reading of the misrepresentation exception is much too broad, for it would exempt from tort liability any operational malfunction by the Government that involved communications in any form." (Page 22a of Petition).

In any event, all argument on this point appears to fall before the ruling of this Court in *U. S.* v. *Neustadt*, 366 U.S. 696. It will be recalled that *Neustadt* dealt with the application of the misrepresentation excep-

tion as applied to a claim arising out of an inaccurate inspection and appraisal report prepared by the Federal Housing Administration. In a footnote this Court answered the Government's present contentions:

> "Our conclusion neither conflicts with nor impairs the authority of *Indian Towing Co.* v. *United States,* 350 U. S. 61, which held cognizable a Torts Act claim for property damages suffered when a vessel ran aground as a result of the Coast Guard's allegedly negligent failure to maintain the beacon lamp in a lighthouse. Such a claim does not 'arise out of . . . misrepresentation,' any more than does one based upon a motor vehicle operator's negligence in giving a misleading turn signal. As Dean Prosser has observed, many familiar forms of negligent conduct may be said to involve an element of 'misrepresentation,' in the generic sense of that word, but '[s]o far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit,' and has been confined 'very largely to the invasion of interests of a financial or commercial character, in the course of business dealings.' Prosser, Torts, Sec. 85, 'Remedies for Misrepresentation,' at 702-703 (1941 ed.). See also 2 Harper and James, Torts, Section 29.13, at 1655 (1956)."

The Court of Appeals relied on this same language in rejecting the Government's contentions (Petition, pp. 23a-24a). Despite its argument of a "conflict" between Circuits on the application of this exception it should be noted that the Government has failed to

demonstrate the "conflict" by reference to similar reported cases.

The logic in rejecting the "misrepresentation exception" is clear when viewed in the light of the many cases wherein the Government has been held liable in aircraft accidents for communication errors of omission or commission. *Union Trust Co.* v. *U. S.*, 113 F. Supp. 20 (DC 1953) affd. sub nom. *Eastern Air Lines* v. *Union Trust Co.*, 221 F. 2d 62 (DC Cir. 1955) affd. sub nom. *United States* v. *Union Trust Co.*, 350 U. S. 907; *United Air Lines* v. *Wiener*, 335 F. 2d 379, 392-8 (9th Cir. 1964).

The Federal Courts have had numerous opportunities to consider the failure of the Tower personnel to warn aircraft of hazards known to the Tower. In *United States* v. *Douglas*, 169 F. 2d 755 (C.C.A. 9, 1948) the Court held that actionable negligence could be based upon the control tower's *negligent failure to warn* an aircraft coming in for a landing of an impediment on the field in the form of a parked plane. The Court stated:

> "The air traffic tower agency of plaintiff had authority and control over traffic and would appear to be in the best position to take precautions for the removal of parked planes as hazards to traffic or to *warn and advise appellees'* pilot of the parked planes' position. Whether or not the action or non-action of the traffic tower in any instance was customary, its operation may constitute negligence." (Our emphasis).

Similarly, in *Hochrein* v. *United States*, 238 F. Supp. 317, the Court referred to the controller's obligation

to provide information necessary to the pilot to discharge his responsibility for his own safety:

> "The regulations outline Toon's duty as an air traffic controller and in effect require a controller to aid and assist the pilots of aircraft within the control zone. This assistance takes a variety of forms including the issuing of clearances and disseminating information regarding traffic in the pattern and control area. * * * Controller Toon failed in his obligation to pass on information which may be necessary for a pilot to discharge his responsibility for his own safety." (P. 319).

In *United States* v. *Schultetus*, 277 F. 2d 322, 328 (1960) the Court of Appeals for the Fifth Circuit referred to this same duty. In addition, it pointed out that when aircraft are operating under instrument conditions there is a greater duty and responsibility on the part of the Tower operators to these aircraft than when the same aircraft are operating under VFR conditions. Conversely a lesser responsibility rests upon the pilot.

More recently in *Furumizo* v. *United States*, — F. 2d — (1967), the Court of Appeals for the Ninth Circuit affirmed a finding of liability on the part of the Government due to the negligent performance of operational tasks by the Tower operator (245 F. Supp. 981). Among other things, both the trier of the facts and the Court of Appeals referred to the duty of the Control Tower personnel to warn pilots of dangerous conditions. In another recent District Court decision, *State of Maryland, et al* v. *United States*, ——F. Supp. —— (USDC - DC - 1966) previously considered by this Court, Judge Holtzoff made a similar finding

against the Government pointing to the negligence of the Traffic Controllers in failing to communicate a timely warning to the crew of the Capital Airlines' aircraft. The "misrepresentation exception" was not relied upon by the Government in either of these cases and it is significant to note that the Government has agreed to pay the judgment in the *State of Maryland* case.

The foregoing discussion clearly demonstrates that the Government's contentions with respect to the "misrepresentation exception" are without merit. The gravamen of the instant complaint was the negligent performance of operational tasks by Government personnel in the Control Tower. The courts below found that the negligent failure of the Government to inform Flight 512 of the visibility decrease was a proximate and concurrent cause of the accident (Petition, p. 19a). The Government cannot absolve itself of liability by contorting the decisions of this Court on the question of the application of the "misrepresentation exception".

POINT II

The questions of fact presented by the Government for review do not warrant the attention of this Court. However, if certiorari is granted this Court should also grant certiorari to Eastern Air Lines, Inc. for a review of the same facts. To do otherwise would be to grant a review of the facts in a semi-vacuum.

While we did not agree with the findings below in so far as they related to Eastern, we did not seek certiorari because these were factual findings concurred in by both lower courts. We continue of this opinion and we believe the short factual summary which we have presented substantiates the conclusion which we reached.

The Government's petition fails to demonstrate a factual situation which cries for the attention of this Court. By a selective reading of the record it seeks to create confusion. It seeks to establish that the courts below ignored significant testimony which cleared the Government of any responsibility for this tragic accident. However, it falls far short of its goal.

The Court below, in analyzing the case against the United States, recognized the unwarranted attempts of the Government to rely upon a myriad of complex regulations (Petition, p. 11a) and an inordinately narrow interpretation of these regulations (Petition, p. 13a). Simply stated the Court of Appeals ruled that by regulation Ketterman, the Approach Controller, was required to transmit current weather and

"subsequent changes which, under all circumstances, the crew would have considered important both in determining whether to attempt a landing, and in preparing for weather conditions most likely to be encountered near the runway" (Petition, p. 14a). The Court found that the 25% drop in visibility was such a *critical change* that in the interests of safety it should have been reported to the crew of Flight 512. It concluded that the Approach Controller was negligent in failing to report it and that this failure was a proximate and concurrent cause of the accident. In reaching this conclusion the Court of Appeals referred, among other things, to the heavy degree of reliance which passengers place upon the Government for insuring the safety of their flights—a fact the Government ignores in its Petition. The Court also referred to the pilot's need to know that weather conditions were becoming marginal.

In the event this Court finds merit in the Government's contentions with respect to these factual findings then we respectfully submit that certiorari should also be granted to Eastern Air Lines for a review of the same facts in so far as its liability to the passengers is concerned. To do otherwise would be to deny substantial justice to Eastern Air Lines in a "test case" situation.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 540

UNITED STATES OF AMERICA,

Petitioner,

v.

GRACE A. INGHAM, as Executrix of the Estate of Paul B. Ingham, deceased,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit was rendered on February 14, 1967 and is reported at 373 F. 2d 227 *sub. nom. Ingham* v. *Eastern Air Lines, Inc.** Petitioner's motion for a rehearing in said court

* The Opinion is set forth on pages 1A-27A of the Appendix of the Petition herein. "App." refers to the appendix to the petition for certiorari.

was denied on March 30, 1967 and judgment was entered on March 31, 1967.

The opinion of the United States District Court for the Eastern District of New York is not officially reported (App. 29a-62a).

Jurisdiction

Petitioner invoked the jurisdiction of this Court under 28 U.S.C. 1254(1).

Questions Presented

1. Where a Government air traffic controller, under a duty to communicate weather conditions to approaching aircraft, reported non-current, superseded and inaccurate information and failed to report accurate and available information which was disseminated by other similarly situated controllers indicating a deteriorating weather condition, is the Government exculpated from liability by the Federal Tort Claims Act "misrepresentation" exception?

2. Where a Federal Aviation Agency Air Traffic Control Procedures Manual section, when reasonably read, required the dissemination of information of weather changes, was the court below bound to accept a strained interpretation of that section asserted by agency employees but rebutted by the section's language and the conduct of other controllers on duty?

3. Where the district court and the court of appeals unanimously found that the Government's operational negligence proximately contributed to plaintiff's death, should this Court undertake a *de novo*, factual review?

Statement

Eastern Air Lines Flight 512 (hereinafter referred to as EAL 512) with 45 passengers aboard crashed while attempting to land at Idlewild International Airport, New York, on November 30, 1962. At the time of the crash, the runway was engulfed in a dense ground fog which impaired flight visibility during the approach and on the runway itself. Paul B. Ingham was one of the twenty-five persons who died as a result of the crash. His Executrix commenced an action against Eastern Air Lines and an action against the United States of America under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* A jury was waived in the case against Eastern and the district court tried the two *Ingham* actions together as a "test case" on issues of liability.

The district court determined that the negligence of both defendants proximately caused the crash.* The court held that a Federal Aviation Agency air traffic controller had failed to provide the crew of EAL 512 with complete, accurate, current and available weather information, and that that operational negligence was a proximate contributing cause of the crash.

The Court of Appeals for the Second Circuit unanimously concurred in the district court's findings that the controller had been given the current weather and that it was important to the crew "both in determining whether to attempt a landing and in preparing for the weather conditions most likely to be encountered near the runway" (App. 14a). It reaffirmed the Government's liability for

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* Eastern's liability was predicated upon the negligent approach and missed approach conducted by the crew. Eastern has not petitioned for certiorari and as to it the judgment is final. Therefore, Eastern's liability and the facts on which liability was found are not discussed except in the context of discussing the liability of the United States.

the operational negligence of an air traffic controller who it found had proximately caused the crash and resulting deaths, and it determined that it was not bound or persuaded by an "inordinately narrow", inflexible and unsafe interpretation of a Government operating manual advanced by several controllers (App. 13a).

The court of appeals considered and rejected three Tort Claims Act defenses asserted by the Government. As to the misrepresentation exception defense, 28 U.S.C. 2680(h), which is the only one raised in this petition, the court stated that if applied to the facts in this case, it would exempt the Government from tort liability for any operational negligence "that involved communications in any form" (App. 22a). Furthermore, it found no conflict between its decision and rulings in other circuits which applied the misrepresentation exception in cases involving financial transactions, flood control predictions and hurricane forecasts.

The facts concerning the negligence of the Government are set forth accurately and fully in the opinions of the court of appeals (App. 9a-19a) and the district court (App. 44a-54a) and in the district court's findings of fact (App. 60a-62a).

Reasons for Denying the Writ

The Government's petition advances artificial issues of law and a non-existent conflict among circuits in what is essentially a plea for a factual review of the evidence by this Court.

I

This is a simple case of operational negligence of an air traffic controller who failed to advise an approaching aircraft of existing weather conditions. The approach controller was informed of the existing weather conditions by

his superior. His duty was to act as a conduit and pass this weather information to approaching aircraft. The negligence consisted of his failure to relay the current weather information provided him to the approaching airliner and his transmission of non-current, superseded inaccurate, and incomplete weather information. Conceptually this case is the same as those which impose liability for the failure to warn one aircraft of the close proximity of another or the erroneous advice given one aircraft of the position of another. This case did not involve issues of policy, the exercise of discretionary responsibility, and "misrepresentation" in the sense intended by the Tort Claims Act. It simply involved negligence in the performance of a mechanical act.

The Tort Claims Act (28 U.S.C. 1346 *et seq.*), waived sovereign immunity for torts committed by governmental employees. In *Indian Towing Co.* v. *United States,* 350 U. S. 61 (1955), this Court stated:

> "The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not leave just treatment to the caprice and legislative burden of individual private laws." at 68.

In urging review based upon the "misrepresentation" exception in the Tort Claims Act (28 U.S.C. 2680[h]), the Government attempts to create a legal issue where none exists. To give weight to its claim, it urges the existence of an "apparent conflict" among the circuits. No conflict exists. The sole purpose of suggesting the existence of a conflict is to lead the Court into a thicket of factual review of evidence; evidence which was found by two courts to support liability on the part of the Government.

The decision by the United States to establish an air traffic control system involved an exercise of discretion and no liability can be based upon on that decision. *Dalehite* v. *United States,* 346 U. S. 15 (1952). However, once having made that decision, Government employees were bound to act in a reasonable manner and a failure to do so rendered the Government liable for omission or commission. *Indian Towing Co.* v. *U. S.,* 350 U. S. 61 (1965); *Rayonier, Inc.* v. *United States,* 352 U. S. 315 (1957).

In *Eastern Air Lines* v. *Union Trust Co.,* 350 U. S. 907 (1957), affirming 221 F. 2d 62 (D. C. Cir. 1955), the Government was held liable for a mid-air collision caused by the negligence of its air traffic controllers who cleared two aircraft to land on the same runway at the same time. The controllers knew the positions and courses of the two aircraft, but failed to relay the information to the aircraft and relayed inaccurate information. This was held to be operational negligence even though it involved an oral communication which inaccurately reported traffic conditions.

If the Government's unique approach to the "misrepresentation" exception is adopted herein, it would bar all claims against the federal government where the operational negligence involved communication, and would require overruling all such previous cases, including *Eastern Air Lines* v. *Union Trust Co., supra.* Such a sweeping interpretation of the Tort Claims Act is not called for by its language, was not intended by its drafters and would virtually destroy its liberalizing effect. The court of appeals below pointed to the limits of the "misrepresentation" exception, stating:

> "Nevertheless, the government's reading of the misrepresentation exception is much too broad, for it would exempt from tort liability any operational malfunction by the government that involved communications in any form." (App. 22a)

Where the action complained of involves the negligent performance or failure to perform a simple act of reporting, there is no "misrepresentation" in the sense intended by the Tort Claims Act. Thus, the "misrepresentation" exception is inapplicable where traffic controllers failed to accurately report the positions and courses of two aircraft, *Eastern Air Lines* v. *Union Trust Co., supra;* it is inapplicable where the Coast Guard failed to properly maintain a lighthouse beacon which would warn vessels of the hazard to navigation, *Indian Towing Co.* v. *United States, supra;* and it is inapplicable here where the controller failed to inform an approaching aircraft of a weather report which had been provided to him for transmittal to aircraft.

It is true that the Government has been held not to be liable for "misrepresentation" in a number of distinguishable situations, largely those involving the element of judgment, of a financial or commercial rather than an operational character, or where the function being performed was governmental in character, directed primarily to the common weal and general public rather than to a private person and not suggesting comparable private liability.

Thus the "misrepresentation" exception has been applied, usually in addition to some other basis for non-liability on the part of the Government, to preclude liability for the prediction and forecast of floods and hurricanes, *National Manufacturing Co.* v. *United States,* 210 F. 2d 263 (4th Cir. 1954); *Carrier* v. *United States,* 369 F. 2d 323 (5th Cir. 1966), cert. denied 386 U. S. 1027; *Clark* v. *United States,* 218 F. 2d 446 (9th Cir. 1954); *Bartie* v. *United States,* 216 F. Supp. 10 (W. D. La. 1963), aff'd 326 F. 2d 754 (5th Cir.), cert. denied 379 U. S. 852 (1964); where financial loss has resulted from an FHA real estate appraisal, *United States* v. *Neustadt,* 366 U. S. 696 (1961); where there was an estimate of the oil production reserve capacity of certain land, *Jones* v. *United States,* 207 F. 2d 563 (2d Cir. 1953), cert. denied 347 U. S. 921 (1954); and

for an opinion that a herd of cattle had a communicable disease, *Hall* v. *United States*, 274 F. 2d 69 (10th Cir. 1959).

The distinction between cases involving business dealings of a financial or commercial nature and operational negligence of the type involved in the instant case is clearly enunciated by this Court in *United States* v. *Neustadt*, 366 U. S. 696 (1961), in which the Court said:

> "Our conclusion neither conflicts with nor impairs the authority of Indian Towing Co. v. United States, 350 U. S. 61, which held cognizable a Torts Act claim for property damages suffered when a vessel ran aground as a result of the Coast Guard's allegedly negligent failure to maintain the beacon lamp in a lighthouse. Such a claim does not 'arise out of * * * misrepresentation,' any more than does one based upon a motor vehicle operator's negligence in giving a misleading turn signal. As Dean Prosser has observed, many familiar forms of negligent conduct may be said, to involve an element of 'misrepresentation,' in the generic sense of that word, but '[s]o far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit,' and has been confined 'very largely to the invasion of interests of a financial or commercial character, in the course of business dealings.'" 366 U. S. at 711, n. 26.

The Government contends that the court below limited both *Neustadt* and the "misrepresentation" exception to commercial-financial transactions. This is not so. The court simply held that both were inapplicable to the facts of this case. It found that the controller's failure to inform the aircraft of current weather conditions was akin to the Coast Guard failure in *Indian Towing* to warn vessels of the hazard through an operative lighthouse beacon.

Both cases involved a negligent failure on the part of the Government employees to perform an operational duty they had undertaken—to provide information and warnings to users of the airways and the waterways.

The Government points to two Ninth Circuit cases to show an "apparent conflict" with the instant case. *Clark* v. *United States,* 218 F. 2d 446 (9th Cir. 1954) held that there could be no recovery for loss of personal property caused by the failure of Government employees to predict the exact time flooding would cause a dam to break, and *DeLange* v. *United States,* 372 F. 2d 134 (9th Cir. 1967) involved an diagnostic opinion of a Government doctor. Neither *Clark* nor *DeLange* is in conflict with the decision below. *Clark* was primarily based upon a separate statute which precluded liability on the part of the United States for damage from floods or flood waters, 33 USCA § 702c, discussed at 218 F. 2d 451-452. Furthermore, like the other flood control and hurricane cases, it involved a function, governmental in character and directed to the general public, and without comparable private liability. See concurring opinion of Judge Johnsen, concurred in by Judge Sanborn, in *National Manufacturing Co.* v. *United States,* 210 F. 2d 263, 279-280 (4th Cir. 1954).

In *DeLange,* the plaintiff, a Government employee, consulted Government doctors who diagnosed her condition as syphilis. Plaintiff's exclusive remedy was under the Federal Employees Compensation Act, and the Court so held in a brief *Per Curiam* opinion. Its reference to the "misrepresentation" exception was unnecessary.

The Government, in its petition, does not cite *United Air Lines* v. *Weiner,* 335 F. 2d 379 (9th Cir.), cert. dismissed 379 U. S. 951 (1964), where it raised and the Ninth Circuit rejected the "misrepresentation" exception defense. The case involved a mid-air collision resulting from the negligent failure of the government controllers to in-

form two aircraft of their respective positions. The Court of Appeals for the Ninth Circuit stated:

> "The government's reliance on 28 U.S.C. Section 2680(h) relating to exemption from the Tort Claims Act of causes of action predicated upon misrepresentation is misplaced. This section applies to claims arising out of misrepresentation. *United States* v. *Neustadt*, 366 U. S. 696, 81 Sup. Ct. 1294, 6 L. Ed. 2d 614 (1960).
>
> Here the gravamen of the action is not misrepresentation but negligent performance of operational tasks, although such negligence consisted partly of a failure of a duty to warn. *Indian Towing, supra; United States* v. *White*, 211 F. 2d 79 (9th Cir. 1954); *Fair* v. *United States, supra; United States* (*Eastern Air Lines*) v. *Union Trust Company, supra.*" At page 398.

Thus, in urging the existence of an "apparent conflict", the Government's petition not only misreads the decision below, but fails to present the relevant Ninth Circuit case directly in point. There is no conflict between the circuits. Both courts agree that the failure to simply report a known hazard, although involving communication, is not the type of "misrepresentation" Section 2680(h) was intended to cover.

II

The Government's second contention relates to the findings of both courts below that the air traffic controller, in failing to give the latest accurate and available weather, had violated a regulation of the FAA contained in an FAA Air Traffic Control Procedures Manual. The regulation required that:

> "§ 265.2. At locations where official weather reports are obtained by the controllers through routine procedures and the ceiling and/or visibility is reported as

being at or below the highest 'circling minima' established for the airport concerned, a report of current weather conditions, and subsequent changes, as necessary, shall be transmitted as follows:

* * *

B. By approach control facilities, to all aircraft at the time of the first radio contact or as soon as possible thereafter * * *."

On the trial the Government presented a strained artificial interpretation of this manual provision through the testimony of some FAA employees. Their testimony was rebutted not only by the plain language of the regulation, but by the proof that other controllers had followed the proper procedure (15a).

Yet the Government contends that the court was obliged to blindly follow the "interpretation" given the manual provision by these FAA employees. Again the legal argument appears to be the vehicle through which the Government urges a factual review. The court below considered the provision in the factual context of this case and concluded the provision was designed to foster aviation safety by providing arriving aircraft with reports of "current weather and changes as necessary". It recognized how vital accurate and current weather information was to the crew of EAL 512 during the critical landing phase. It made a factual finding that "necessary" information was not reported and determined that "the inescapable conclusion is that the regulation was violated" (App. 21a). For this Court to conclude otherwise would require it to review the facts, reject the findings of both lower courts, and determine that the information was unnecessary.

The Court of Appeals as well as the District Court found that the government had undertaken the duty of reporting critically needed weather changes. The Government contends that these Courts misconstrued the manual since they

did not blindly follow the "inordinately narrow" interpretation of this regulation testified to by several controllers, an interpretation contrary to the language of the manual, contrary to the needs of air safety, and contrary to the procedures actually followed by three of the four controllers on duty at the time of the accident.

As the opinion indicates (11a-17a), the court below carefully considered this interpretation of the manual provision and rejected it for compelling reasons. Courts properly give great weight to a duly promulgated agency interpretation of a regulation since this has the effect of law and the public, aware of the interpretation, is assumed to act accordingly. But the respect given to administrative interpretations of regulations of this kind does not apply to interpretations of every agency manual, regulation or instruction establishing operating procedures, particularly when the interpretation is unpublished, offered on a trial in the form of oral testimony after the fact, and when it is contrary to the plain language of the provision. As to these, the courts are free to read manuals and interpret them in a reasonable manner and consistent with their purpose. *Miller* v. *United States,* 294 U. S. 435 (1935); *Smith* v. *Sutton,* 135 F. Supp. 805 (D. C. Cir. 1955). The interpretation of agency personnel and counsel is not binding on the courts. *Clemons* v. *United States,* 245 F. 2d 298 (6th Cir. 1957), and ambiguity should be resolved against the Government, *Cole* v. *Young,* 351 U. S. 536 (1955).

III

The final grounds urged for review is that the Government disagrees with the District Court and Court of Appeals findings that its negligence was a proximate cause of the crash. All that need be said is that this clearly seeks a review of the unanimous factual findings of the lower courts and such review is contrary to the policy of this Court. *Graver Mfg. Co.* v. *Linde,* 336 U. S. 271, 275 (1949).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 1967